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# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

July 24, 2023

Stephen Journey, Commission Counsel  
Commission Advising and Docketing Management  
William B. Travis State Office Building  
1701 N. Congress, 7th Floor  
Austin, Texas 78701

**VIA EFILE TEXAS**

**RE: SOAH Docket No. 473-23-03499; PUC Docket No. 53931;  
*Application of Southwestern Electric Power Company for Authority to  
Reconcile Fuel Costs***

Dear Mr. Journey:

Please find attached a Proposal for Decision (PFD) in this case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. Please notify the undersigned Administrative Law Judges and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Enclosure

CC: Service List

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# **BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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## **APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO RECONCILE FUEL COSTS**

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## LIST OF ACRONYMS AND ABBREVIATIONS

TERM	DEFINITION
AEO	Annual Energy Outlook
AEP	American Electric Power
ALJ	Administrative Law Judge
Application	SWEPCO's application filed August 31, 2022
APSC	Arkansas Public Service Commission
CARD	Cities Advocating Reasonable Deregulation
COL	Conclusion of Law
Commission	Public Utility Commission of Texas
Company	Southwestern Electric Power Company
Cooperatives	ETEC and NTEC, jointly
CCR	Coal Combustion Residuals
EIA	Energy Information Administration
ELG	Effluent Limitation Guidelines
EPA	U.S. Environmental Protection Agency
ETEC	East Texas Electric Cooperative, Inc.
FGD	Flue Gas Desulfurization
HSPM	Highly Sensitive Protected Material
IRP	Integrated Resource Plan
MMBtu	Million British thermal units
MW	Megawatt
MWh	Megawatt-hour
NACC	North American Coal Corporation
NTEC	Northeast Texas Electric Cooperative, Inc.
OPUC	Office of Public Utility Counsel
PURA	Public Utility Regulatory Act
Reconciliation Period	January 1, 2020, through December 31, 2021
RFI	Request for Information
SOAH	State Office of Administrative Hearings
SPP	Southwest Power Pool
SWEPCO	Southwestern Electric Power Company
Staff	Commission Staff

TAC	Texas Administrative Code
TIEC	Texas Industrial Energy Consumers
TPDES	Texas Pollutant Discharge Elimination System

# **BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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## **APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO RECONCILE FUEL COSTS**

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### **PROPOSAL FOR DECISION**

Southwestern Electric Power Company (SWEPCO or the Company) filed an application (Application) with the Public Utility Commission of Texas (Commission) for authority to reconcile its eligible fuel expenses and revenues for the period of January 1, 2020, through December 31, 2021 (Reconciliation Period). Before the hearing on the merits, the parties reached a partial settlement agreement resolving all issues except whether SWEPCO's decision to retire the H. W. Pirkey Power Plant (Pirkey plant) was prudent.<sup>1</sup>

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<sup>1</sup> SWEPCO Exs. 41, 42 (Stipulation).

SWEPCO argues that retirement of the plant was prudent. Cities Advocating Reasonable Deregulation (CARD); East Texas Electric Cooperative, Inc. (ETEC) and Northeast Texas Electric Cooperative, Inc. (NTEC) (collectively, the Cooperatives); North American Coal Corporation (NACC); Texas Industrial Energy Consumers (TIEC); the Office of Public Utility Counsel (OPUC); and Commission staff (Staff) all contend that the decision to retire the Pirkey plant was not prudent.<sup>2</sup>

For the reasons discussed below, the Administrative Law Judges (ALJs) recommend that the Commission find SWEPCO's decision to retire the Pirkey plant was prudent.

## **I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

Jurisdiction and notice are undisputed and therefore addressed in the Findings of Fact and Conclusions of Law without further discussion here.

SWEPCO filed its Application on August 31, 2022, and the Commission referred this case to the State Office of Administrative Hearings (SOAH) on October 19, 2022.<sup>3</sup> On October 20, 2022, the Commission issued its Preliminary Order identifying the issues to be addressed in this proceeding.<sup>4</sup>

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<sup>2</sup> Nucor Steel Longview LLC is also a party to this case but did not take a position on this issue.

<sup>3</sup> Application (Aug. 31, 2022); Order of Referral (Oct. 19, 2022).

<sup>4</sup> Preliminary Order (Oct. 20, 2022).

The following parties intervened and filed testimony: CARD, the Cooperatives, NACC, OPUC, and TIEC. Staff filed testimony as well.<sup>5</sup> Nucor Steel Longview LLC (Nucor) intervened but did not file any testimony. SWEPCO filed direct testimony with the Application and rebuttal testimony.

The hearing on the merits was held on April 25-27, 2023, via videoconference before ALJs Cassandra Quinn, Andrew Lutostanski, and Katerina DeAngelo.<sup>6</sup> On the first day of hearing, the parties requested additional time for settlement discussions, and the following day, they announced that they had reached a settlement in principle resolving all issues except the prudence of the Pirkey plant retirement decision. The hearing then addressed only that issue. The evidentiary record closed on May 25, 2023, with the filing of post-hearing reply briefs.

After the hearing, SWEPCO and CARD filed updates to their rate-case expenses incurred in this proceeding. Additionally, the parties filed an Unopposed Stipulation and Agreement (Stipulation).<sup>7</sup> SWEPCO, Staff, OPUC, TIEC, and CARD agree to the Commission's implementation of the Stipulation; and Nucor and the Cooperatives do not oppose it. On July 17, 2023, SWEPCO filed a motion to

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<sup>5</sup> Staff testimony does not address the prudence of closing of the Pirkey plant in this proceeding but relies on the recommendation filed by Staff witness Sherryhan Ghanem in *Application of Southwestern Electric Power Company for Certificate of Convenience and Necessity Authorization and Related Relief for the Acquisition of Generation Facilities*, Docket No. 53625.

<sup>6</sup> Given the limited scope of this proceeding after the parties' Unopposed Stipulation and Agreement, Judge Lutostanski did not participate in preparing this Proposal for Decision.

<sup>7</sup> The Stipulation includes proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs on the uncontested issues. SWEPCO Ex. 41 (Stipulation), Attachment D. In addition, on July 19, 2023, SWEPCO, CARD, and Staff filed agreed proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs addressing rate-case expenses.

admit certain post-hearing filings as exhibits.<sup>8</sup> The motion is granted, the evidentiary record is reopened for the limited purpose of admitting the exhibits, and the exhibits are admitted.

## II. SCOPE OF PROCEEDING

The Commission's rules provide that: "The scope of a fuel reconciliation proceeding includes any issue related to determining the reasonableness of the electric utility's fuel expenses during the reconciliation period and whether the electric utility has over- or under-recovered its reasonable fuel expenses."<sup>9</sup> CARD and TIEC note that the prudence of retiring the Pirkey plant was not a finding requested in SWEPCO's Application, nor included in the Commission's Preliminary Order as an issue to be addressed in this proceeding.<sup>10</sup>

However, given how the scope of this proceeding is defined, the prudence of SWEPCO's decision to retire the Pirkey plant would be relevant to the extent that it affected fuel costs in the Reconciliation Period.<sup>11</sup> In this case, SWEPCO's retirement decision resulted in an increase in lignite costs during the Reconciliation Period.<sup>12</sup> Accordingly, the ALJs conclude that the scope of this proceeding includes the

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<sup>8</sup> The specific exhibits are CARD Exs. 33, 34, 35; Staff Exs. 3, 3A; SWEPCO Exs. 41, 42, 43, 44.

<sup>9</sup> 16 Tex. Admin. Code § 25.236(d)(2).

<sup>10</sup> CARD Initial Brief at 4; TIEC Initial Brief at 1-3.

<sup>11</sup> SOAH Order No. 6 (Mar. 24, 2023); *see also* Preliminary Order at 8 (Oct. 20, 2022) ("This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ or by the Commission in future orders issued in this docket.").

<sup>12</sup> *See* SWEPCO Ex. 1 (Ferry-Nelson Dir.) at 4 (testifying that the decision to retire the Pirkey plant "did cause upward pressure on SWEPCO's cost of lignite during the Reconciliation Period").

prudence of SWEPCO's November 2020 decision to retire the Pirkey plant, as well as whether SWEPCO should have re-evaluated that decision during the Reconciliation Period, such that the re-evaluation would have impacted costs at issue in this proceeding.

### **III. PRUDENCE OF PIRKEY PLANT RETIREMENT**

#### **A. BACKGROUND**

The Pirkey plant is a 675-megawatt (MW) single-unit lignite-fired generation plant located in Harrison County, Texas.<sup>13</sup> The plant began providing service to customers in 1985 and had an original retirement date of 2045.<sup>14</sup> Lignite for the Pirkey plant was mined adjacent to the plant at the Sabine mine by a contract miner, the Sabine Mining Company,<sup>15</sup> on reserves controlled by SWEPCO.<sup>16</sup> The Pirkey plant is owned by SWEPCO (86% or 580 MW), NTEC (intervenor in this case) (11.7%), and Oklahoma Municipal Power Authority (2.3%).<sup>17</sup>

On November 5, 2020, SWEPCO announced that it would retire the Pirkey plant in March 2023. SWEPCO made this decision after evaluating the

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<sup>13</sup> SWEPCO Ex. 1 (Ferry-Nelson Dir.) at 11; SWEPCO Ex. 5 (Meyer Dir.) at 7; CARD Ex. 1 (Norwood Dir.) at 10; Cooperatives Ex. 1 (Striedel Dir.) at 9.

<sup>14</sup> Cooperatives Ex. 1 (Striedel Dir.) at 9; SWEPCO Ex. 16 (Martin Reb.) at 4-5; SWEPCO Ex. 7 (Gedeon Dir.) at 6; TIEC Ex. 1 (Pollock Dir.) at 11.

<sup>15</sup> The Sabine Mining Company is a subsidiary of intervenor NACC. SWEPCO Ex. 13 (Meyer Reb.) at 6.

<sup>16</sup> SWEPCO Ex. 7 (Gedeon Dir.) at 7.

<sup>17</sup> Cooperatives Ex. 1 (Striedel Dir.) at 10; SWEPCO Ex. 1 (Ferry-Nelson Dir.) at 11; SWEPCO Ex. 5 (Meyer Dir.) at 7; SWEPCO Ex. 7 (Gedeon Dir.) at 6.

cost-effectiveness of making the necessary capital expenditures to comply with the U.S. Environmental Protection Agency (EPA) Coal Combustion Residuals (CCR) Rule and Effluent Limitation Guidelines (ELG) that would allow the plant to continue operation beyond 2023.<sup>18</sup>

The CCR Rule, finalized in 2015, regulates the disposal and beneficial use of CCR. These residuals include fly ash (ash that is collected in electrostatic precipitators), bottom ash (ash that is collected from the bottom of a coal-fired boiler), and gypsum (a byproduct of the flue gas desulfurization (FGD) process) that are generated at coal electric generating units through normal unit operation.<sup>19</sup> In 2020, the CCR Rule compliance deadline was extended to April 11, 2021, but allowed an extension for coal-fired generating plants that agreed to cease operations.<sup>20</sup> The length of the extension depended on the size of the CCR surface impoundments. Plants with CCR surface impoundments of 40 acres or less could operate until October 17, 2023, and plants with surface impoundments larger than 40 acres could operate until October 17, 2028.<sup>21</sup>

Also in 2020, the EPA revised the ELG for steam-electric generation facilities.<sup>22</sup> The revisions established new discharge limits for FGD wastewater,

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<sup>18</sup> SWEPCO Ex. 1 (Ferry-Nelson Dir.) at 4, 11-12; SWEPCO Ex. 5 (Meyer Dir.) at 7.

<sup>19</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 4.

<sup>20</sup> 40 C.F.R. § 257.103(f)(2).

<sup>21</sup> 40 C.F.R. § 257.103(f)(2)(iv); *see also* SWEPCO Ex. 14 (Spitznogle Reb.) at 5-6; NACC Ex. 1 (Schwartz Dir.) at 9.

<sup>22</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 14.

transport water used for fly ash and bottom ash handling, and other wastewaters.<sup>23</sup> The revised rule eliminated the ability to discharge most ash transport waters and required enhanced treatment of FGD wastewaters.<sup>24</sup>

The Pirkey plant had two unlined bottom ash surface impoundments subject to the CCR Rule—the east bottom ash pond (EBAP) and the west bottom ash pond (WBAP)—for the management of bottom ash and non-CCR wastewaters.<sup>25</sup> The EBAP and WBAP are 31.5 and 30.9 acres, respectively.<sup>26</sup> Bottom ash generated at the plant was sluiced to one of the ponds until it was nearly full, and then the second pond would become the active pond.<sup>27</sup> The inactive pond would then be drained and dewatered and the bottom ash transported to the landfill.<sup>28</sup> The EBAP and WBAP did not meet the CCR Rule’s liner requirements.<sup>29</sup>

In the Fall of 2020, SWEPCO performed an internal economic analysis (the 2020 Analysis) that compared the cost of making the CCR and ELG retrofits to the cost savings of retiring the Pirkey plant.<sup>30</sup> After evaluating the cost-effectiveness of

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 3; Cooperatives Ex. 1 (Striedel Dir.) at 9.

<sup>27</sup> NACC Ex. 1 (Schwartz Dir.) at 10; SWEPCO Ex. 14 (Spitznogle Reb.) at 7.

<sup>28</sup> NACC Ex. 1 (Schwartz Dir.) at 10.

<sup>29</sup> *See id.* at 4, 15.

<sup>30</sup> SWEPCO Ex. 1 (Ferry-Nelson Dir.) at 12; SWEPCO Ex. 16 (Martin Reb.) at 3; TIEC Ex. 1 (Pollock Dir.) at 14.

continued operation of the plant inclusive of all ongoing operating and fuel costs, SWEPCO determined that retirement was the most reasonable option.<sup>31</sup>

On November 30, 2020, SWEPCO submitted its decision to the EPA to retire the Pirkey plant in lieu of making the capital expenditures necessary for continued operation.<sup>32</sup> Because SWEPCO treated the WBAP and EBAP as separate CCR surface impoundments, the CCR Rule's October 17, 2023 closure deadline for ponds under 40 acres was triggered.<sup>33</sup>

To fill a portion of the capacity need that would be created by retiring the Pirkey plant, SWEPCO filed an application with the Commission on May 19, 2022, in Docket No. 53625 for a certificate of convenience and necessity (CCN) for approval to acquire certain solar and wind generation facilities.<sup>34</sup> The Commission denied the CCN application.<sup>35</sup>

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<sup>31</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 6.

<sup>32</sup> SWEPCO Ex. 1 (Ferry-Nelson Dir.) at 12; SWEPCO Ex. 14 (Spitznogle Reb.) at 6.

<sup>33</sup> NACC Ex. 1 (Schwartz Dir.) at 10-11; 40 C.F.R. § 257.103(f)(2)(iv).

<sup>34</sup> *Application of Southwestern Electric Power Company for Certificate of Convenience and Necessity Authorization and Related Relief for the Acquisition of Generation Facilities*, Docket No. 53625, Application (May 19, 2022).

<sup>35</sup> Docket No. 53625, Order (June 7, 2023). SWEPCO's post-hearing briefing in the instant proceeding references the Proposal for Decision in Docket No. 53625, which had recommended approval of SWEPCO's requested CCN. However, given the Commission's decision, which rejected that PFD, the ALJs do not address those arguments here. In reply briefs, the Cooperatives, TIEC, and Staff cite to a memorandum filed by Commissioner Will McAdams in Docket No. 53625 prior to the open meeting at which the Commission denied SWEPCO's CCN application. SWEPCO filed a response requesting that the ALJs not consider the memorandum because it is not part of the evidentiary record in this case and is not precedential. For the reasons SWEPCO identified, the ALJs do not consider the memorandum.

The Pirkey plant was retired on March 31, 2023.<sup>36</sup> This case is the first proceeding to consider the prudence of that decision.<sup>37</sup>

## **B. PRUDENCE STANDARD**

The Commission defines prudence as:

the exercise of that judgment and the choosing of one of that select range of options which a reasonable utility manager would exercise or choose in the same or similar circumstances given the information or alternatives available at the point in time such judgment is exercised or option is chosen.<sup>38</sup>

The prudence standard “explicitly incorporates a utility’s reasonableness and, by speaking in terms of available alternatives, implicitly recognizes that an expense must be necessary.”<sup>39</sup> What is prudent, reasonable, and necessary depends on the circumstances.<sup>40</sup> As the Commission has stated:

There may be more than one prudent option within the range available to a utility in a given context. Any choice within the select range of reasonable options is prudent, and the Commission should not substitute its judgment for that of the utility. The reasonableness of an action or decision must be judged in light of the circumstances, information, and available options existing at the time, without benefit of hindsight.<sup>41</sup>

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<sup>36</sup> SWEPCO Ex. 12 (Ferry-Nelson Reb.) at 11.

<sup>37</sup> See CARD Ex. 8 (SWEPCO Response to CARD Request for Information (RFI) No. 8-15).

<sup>38</sup> *Gulf States Utilities Co. v. Pub. Util. Comm’n of Tex.*, 841 S.W.2d 459, 475 (Tex. App.—Austin 1992, writ denied).

<sup>39</sup> *Nucor Steel v. Pub. Util. Comm’n of Tex.*, 26 S.W.3d 742, 748 (Tex. App.—Austin 2000, pet. denied).

<sup>40</sup> *Id.* at 749.

<sup>41</sup> *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 46449, Order on Rehearing at Conclusion of Law (COL) No. 16 (Mar. 19, 2018).

Prudent decision-making may be demonstrated in one of two ways: “a utility may show either that its decision-making process was prudent, or that the same decision is in the select range of options that would have resulted had prudent decision making been employed.”<sup>42</sup> The first method requires the production of contemporaneous documentation of a utility’s decision-making process that will allow the Commission to review the actual investigations and analyses leading to the utility’s decision.<sup>43</sup> When there is no evidence of contemporaneous investigation and analysis, a utility may employ the second method, analyzing the prudence of the decision after the fact.<sup>44</sup>

A utility bears the burden of proving that its decision making was prudent.<sup>45</sup>

## **C. PARTIES’ EVIDENCE AND ARGUMENTS**

### **1. SWEPCO’s position**

To support the prudence of its decision to retire the Pirkey plant, SWEPCO relies primarily on its 2020 Analysis.<sup>46</sup> Although the analysis was prompted by the CCR Rule and ELG requirements, SWEPCO contends that it revealed that, due to the Pirkey plant’s high fuel costs and non-fuel operating costs, retirement in 2023

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<sup>42</sup> *Gulf States*, 841 S.W.2d at 475-76; *see also* Docket No. 46449, Order on Rehearing at COL No. 17.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Entergy Gulf States, Inc. v. Pub. Util. Comm’n of Tex.*, 112 S.W.3d 208, 215 (Tex. App.—Austin 2003, pet. denied).

<sup>46</sup> SWEPCO Initial Brief at 2-5.

would be beneficial to customers even if there were *zero costs* for CCR and ELG compliance.<sup>47</sup>

The 2020 Analysis reviewed six coal and lignite plants owned by four operating companies in the American Electric Power (AEP) system, including the Pirkey plant, to determine whether the investments needed for compliance with the CCR Rule and ELG should be made or not.<sup>48</sup> Based on the results, AEP elected to make the compliance investments at four of the plants, including SWEPCO's Flint Creek plant, but concluded that continued operation of the Pirkey plant and supporting mine would not be as economical as retiring them.<sup>49</sup>

With respect to the Pirkey plant, the 2020 Analysis compared retiring the plant in 2023 or 2028 with making the CCR and ELG retrofits and continuing to operate the plant until 2045 (the end of its projected useful life). SWEPCO ruled out the 2028 retirement option, as discussed further below. In comparing retirement in 2023 versus 2045, the analysis considered two scenarios: (1) the AEP 2020 Base No Carbon forecast, and (2) the AEP 2020 Base with Carbon forecast (which assumed a national \$15 per ton carbon emissions tax).<sup>50</sup> According to SWEPCO, the modeling chose the optimal resources to fill the capacity need created by retiring the

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<sup>47</sup> SWEPCO Ex. 16 (Martin Reb.) at 17.

<sup>48</sup> SWEPCO Ex. 12 (Ferry-Nelson Reb.) at 6; SWEPCO Ex. 16 (Martin Reb.) at 3.

<sup>49</sup> SWEPCO Ex. 16 (Martin Reb.) at 4-5.

<sup>50</sup> *Id.* at 4, 9.

Pirkey plant.<sup>51</sup> The net present value and nominal savings to customers projected due to the 2023 retirement are summarized in the following table:<sup>52</sup>

<b>Table 1 - Pirkey 2023 Retirement Savings</b>					
Scenario	NET Present Value Savings of No CCR Expenditure over CCR&ELG Expenditure (Amounts in \$000)				Nominal (Undiscounted) Savings - Cumulative through 2045
	2020-2030 Planning Period	2021-2050 Planning Period	Post-2050 End-Effects Period	Planning Period + End-Effects Period	
Pirkey No Carbon Scenario	154,595	300,928	26,001	326,930	739,443
Pirkey Including Carbon Scenario	194,360	452,713	9,663	462,376	1,167,768

As shown, the lifetime net present value of the savings of avoiding the CCR and ELG compliance costs and other costs of operating the plant and retiring the Pirkey plant in 2023 would be \$326.9 million in the No Carbon scenario and \$462.4 million in the Including Carbon scenario. The nominal (undiscounted) savings of these two scenarios would be \$739.4 million in the No Carbon case and \$1.168 billion in the Including Carbon case. The nominal savings are SWEPCO's projection of what customers would actually save on their bills.<sup>53</sup>

SWEPCO contends that the results of the 2020 Analysis are put into context by recognizing that the Pirkey plant's fuel costs had been increasing.<sup>54</sup> As shown

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<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.*

<sup>54</sup> SWEPCO Initial Brief at 5-6.

below, the cost of fuel delivered from the adjacent Sabine mine had increased substantially over time:<sup>55</sup>

TABLE 2 - Pirkey Fuel Cost History *	
	Delivered Cost per Ton
2005	20.516
2010	30.963
2015	42.39
2018	41.34
2019	48.72
2020	72.44
* FERC Form 1 page 403.1	

Due to the increased fuel costs, SWEPCO maintains that the Pirkey plant is not as valuable in the energy market as it once was. Additionally, the projected fuel cost for the plant for 2021 to 2037 was predicted to be higher than any other SWEPCO solid fuel plant on a per megawatt-hour (MWh) basis.<sup>56</sup> SWEPCO witness James Martin testified that the Pirkey plant’s operating and fuel costs had become too high relative to other options the Company had to provide capacity and energy—thus, “Pirkey had recently developed an operating cost problem, not an environmental regulation cost or timing problem.”<sup>57</sup>

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<sup>55</sup> SWEPCO Ex. 16 (Martin Reb.) at 7; *see also* Cooperatives Ex. 1 (Striedel Dir.) at 11, Table 1 (showing increasing production costs at the Pirkey plant on a per megawatt-hour basis from 2017-2021).

<sup>56</sup> SWEPCO Ex. 16 (Martin Reb.) at 10.

<sup>57</sup> *Id.* at 17.

SWEPCO emphasizes that the 2020 Analysis was based on the information available to SWEPCO at the time that its decision had to be communicated to the EPA. Based on that analysis, SWEPCO argues that, even assuming the decision could be walked back, SWEPCO and its customers would be harmed by that decision.<sup>58</sup> In addition, after performing additional analyses suggested by intervenors in this case, SWEPCO contends that retiring the Pirkey plant in 2023 remains the best option for customers. In SWEPCO's view, the decision to retire the plant was prudent when it was made in November 2020 and is still reasonable today.

## **2. Intervenors' and Staff's positions**

Intervenors and Staff argue that SWEPCO's decision to retire the Pirkey plant was imprudent. As detailed below, CARD, the Cooperatives, NACC, and TIEC challenge the assumptions used in the 2020 Analysis and its failure to consider certain benefits of retaining the plant. They further allege that SWEPCO put the interests of its management and shareholders ahead of its ratepayers, and that SWEPCO ignored lower cost options to continue operating the plant.<sup>59</sup>

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<sup>58</sup> SWEPCO Initial Brief at 7-8.

<sup>59</sup> OPUC supports the positions taken by TIEC. OPUC Initial Brief at 2-3. Staff does not oppose anything in NACC's initial brief and specifically supports NACC's arguments regarding CCR reclassification/retrofits. Staff Supplemental Statement of Position at 1. Staff also continues to support the recommendations of its witness Sherryhan Ghanem in Docket No. 53625, outlining options SWEPCO could have taken instead of retiring the Pirkey plant. Staff Statement of Position at 1-2. However, Ms. Ghanem's testimony is not in the evidentiary record for the instant proceeding and, therefore, is not considered.

**a) Criticisms of the 2020 Analysis**

**(i) Lack of sensitivity analyses**

CARD and TIEC contend that SWEPCO's 2020 Analysis is flawed because it failed, with one exception, to include sensitivity analyses, most notably with respect to natural gas prices.<sup>60</sup> SWEPCO used only one natural gas price forecast, which CARD witness Scott Norwood testified was "more than 80% lower than current market prices and far below what current gas futures prices indicate the price of gas will be over the next several years."<sup>61</sup> According to Mr. Norwood, using a single low natural gas price to evaluate a major financial decision such as retirement of the Pirkey plant, without considering the potential for higher gas prices, "is virtually unheard of within the industry."<sup>62</sup>

SWEPCO's analysis also did not include sensitivity analyses to evaluate the impact of changes to other commodity prices, Southwest Power Pool (SPP) market energy prices, or capital costs.<sup>63</sup> TIEC states that the 2020 Analysis only projects a 2.2% to 2.6% cost savings for retiring the Pirkey plant in 2023, which is well within the margin of error for an analysis that spans decades.<sup>64</sup> In TIEC's view, these margins are close enough that sensitivity analyses accounting for possible variances

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<sup>60</sup> CARD Initial Brief at 5-6; TIEC Initial Brief at 4-5.

<sup>61</sup> CARD Ex. 1 (Norwood Dir.) at 13.

<sup>62</sup> *Id.*

<sup>63</sup> TIEC Ex. 1 (Pollock Dir.) at 15; CARD Ex. 1 (Norwood Dir.) at 13.

<sup>64</sup> TIEC Ex. 1 (Pollock Dir.) at 14-15.

in future conditions could have tilted the scale away from deciding to retire the plant early.<sup>65</sup> Accordingly, the results of the analysis are not robust and should be given little weight.<sup>66</sup> Additionally, Mr. Norwood testified that the SPP market-energy-price forecast used in the analysis is far below current market prices.<sup>67</sup> He asserted that the analysis failed to consider a high market-price forecast to assess the Pirkey plant's value as a hedge against extreme market events, such as occurred during Winter Storm Uri.<sup>68</sup>

TIEC notes that in prior cases SWEPCO has recognized the value of sensitivity analyses. For example, the modeling in SWEPCO's base-rate case in Docket No. 46449, which SWEPCO used to justify installing environmental controls on the Pirkey plant, included sensitivity cases that considered various natural gas and SPP market prices.<sup>69</sup>

In the present case, TIEC criticizes the one sensitivity analysis that SWEPCO considered—the assumption that a future carbon emissions tax could add to the cost of operating the Pirkey plant.<sup>70</sup> TIEC states that no carbon tax currently exists for fossil-fuel generation and SWEPCO did not demonstrate that a future tax is likely.<sup>71</sup>

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<sup>65</sup> TIEC Initial Brief at 4; TIEC Ex. 1 (Pollock Dir.) at 17.

<sup>66</sup> TIEC Ex. 1 (Pollock Dir.) at 17.

<sup>67</sup> CARD Ex. 1 (Norwood Dir.) at 13.

<sup>68</sup> *Id.*

<sup>69</sup> TIEC Ex. 1 (Pollock Dir.) at 18.

<sup>70</sup> TIEC Initial Brief at 4-5.

<sup>71</sup> TIEC Ex. 1 (Pollock Dir.) at 16.

TIEC witness Jeffery Pollock testified that public policy has historically favored tax credits as a means to encourage the development of renewable resources rather than imposing a carbon adder to penalize fossil generators.<sup>72</sup> The most recent example is the Inflation Reduction Act, which implemented tax credits for renewable resources but no carbon adder on fossil-fuel plants.<sup>73</sup> TIEC also points out that the Commission recently found in Docket No. 52487 that, “[a]lthough it is possible a carbon tax will be imposed in the future, such a tax has not been imposed in the past, and the evidence does not show imposition of such a tax is probable in the future.”<sup>74</sup> Yet, by evaluating a potential carbon tax, SWEPCO assumed higher operating costs for the Pirkey plant, thereby biasing the analysis toward early retirement.<sup>75</sup>

NACC also notes that SWEPCO’s analysis was criticized in its recent base-rate proceeding in Arkansas, where SWEPCO presented the 2020 Analysis as evidence to support the early retirement of the Pirkey plant and other facilities. Testimony filed on behalf of the General Staff of the Arkansas Public Service Commission (APSC) stated that:

[T]he Company’s analysis is overly simplistic and lacks robustness. The Company only evaluated the economics under one fuel price forecast with one sensitivity related to CO<sub>2</sub> pricing regulation. The Company also did not analyze combinations of retirements. The Company’s analysis did not address a full range of risks that are relevant

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Application of Entergy Texas, Inc. to Amend its Certificate of Convenience and Necessity to Construct Orange County Advanced Power Station*, Docket No. 52487, Order on Rehearing at Finding of Fact No. 131 (Jan. 12, 2023).

<sup>75</sup> TIEC Initial Brief at 5; TIEC Reply Brief at 4.

to the Commission's consideration of the economic conclusions of the analysis.<sup>76</sup>

While the APSC General Staff ultimately determined that the early retirement of the Pirkey plant was a better economic decision than committing capital for environmental retrofits, that conclusion was expressly subject to the above concerns regarding the robustness of the 2020 Analysis's methodology.<sup>77</sup>

## **(ii) Cost of coal**

NACC claims that the 2020 Analysis assumed an artificially inflated cost of coal that was driven by SWEPCO's own decisions to reduce lignite production and delivery from the Sabine mine.<sup>78</sup> The cost of coal is the largest component of the operating costs for the Pirkey plant, averaging about 83% of its annual average operating costs, and thus, is a critical factor in the analysis.<sup>79</sup>

Under its agreement with the Sabine Mining Company, SWEPCO annually designates the quantity of lignite to be delivered to the Pirkey plant for the following year.<sup>80</sup> NACC explains that, like most large mines, the Sabine mine has a high level of fixed operating costs and low variable operating costs, making fuel costs low when dispatch is steady and elevating fuel costs when dispatch is low.<sup>81</sup> In other words, the

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<sup>76</sup> SWEPCO Ex. 31 (APSC Docket 21-070-U Direct Testimony of John Athas on behalf of APSC General Staff) at 7.

<sup>77</sup> *Id.* at 22-23.

<sup>78</sup> NACC Initial Brief at 8-11.

<sup>79</sup> NACC Ex. 1 (Schwartz Dir.) at 15-16.

<sup>80</sup> SWEPCO Ex. 5 (Meyer Dir.) at 9.

<sup>81</sup> NACC Ex. 1 (Schwartz Dir.) at 16.

delivered cost of lignite increases as the fixed costs are spread over fewer tons produced.<sup>82</sup>

From 2010 to 2018, SWEPCO operated the Pirkey plant at an average capacity factor close to 80%, burning an average of 3.8 to 4.2 million tons of lignite per year.<sup>83</sup> However, in 2019, the Pirkey plant experienced an outage lasting approximately three months that reduced both the total tons of lignite burned and the dispatch of the plant.<sup>84</sup> Because each year's lignite mining plan is based on the previous year's deliveries to the Pirkey plant, SWEPCO's 2020 forecasted fixed and variable costs of lignite production were based on 2019's atypically low production from the mine.<sup>85</sup> As a result, SWEPCO assumed in the 2020 Analysis that the plant would be much less economic to operate through 2028 than it had been prior to 2019.<sup>86</sup> In NACC's view, it was imprudent for SWEPCO to rely on the 2019 figures in determining whether to retire the Pirkey plant.<sup>87</sup>

NACC also notes that SWEPCO did not update the estimated fixed and variable costs of coal production for 2021. Thus, the annual mine plans in place for 2020 and 2021 during the Reconciliation Period were based on the Pirkey plant's

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Transcript of the Hearing on the Merits (Tr.) Vol. 3 at 42.

<sup>85</sup> *Id.* at 43.

<sup>86</sup> NACC Ex. 1 (Schwartz Dir.) at 17.

<sup>87</sup> NACC Initial Brief at 8.

2019 lignite burn, which was impacted by the outage.<sup>88</sup> Consequently, SWEPCO contracted for just over 1.63 million tons of lignite from the Sabine mine in 2020 and just over 1.85 million tons for 2021.<sup>89</sup> NACC contends that, because these amounts were less than half the pre-2019 levels, SWEPCO caused the delivered cost of lignite to effectively double as the costs were spread over fewer tons produced.<sup>90</sup>

### **(iii) Capacity factor**

CARD and NACC further contend that the 2020 Analysis is flawed because it assumed a low capacity factor for the Pirkey plant of approximately 35%.<sup>91</sup> CARD explains that the forecasted capacity factor levels used for the Pirkey plant were far lower than what SWEPCO had forecasted for the plant in its 2018 and 2019 Integrated Resource Plans (IRPs).<sup>92</sup> CARD argues that this discrepancy suggests that SWEPCO's production modeling for the analysis was not realistic or was otherwise conducted to understate the future energy benefits of maintaining the plant in operation past 2023, thereby artificially favoring the retirement option. CARD notes that the forecasted capacity factors of other SWEPCO coal units in the analysis were also extremely low, which had the effect of diminishing energy benefits

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<sup>88</sup> *Id.* at 10.

<sup>89</sup> Tr. Vol. 2 at 50.

<sup>90</sup> NACC Initial Brief at 10-11.

<sup>91</sup> CARD Initial Brief at 7-9; CARD Ex. 1 (Norwood Dir.), Attachment SN-7 (SWEPCO Response to CARD RFI 4-18); NACC Reply Brief at 8-10.

<sup>92</sup> CARD Ex. 1A (Norwood Dir.) at 15, Table 1 (Highly Sensitive Protected Material (HSPM)).

of coal-fired units when compared to replacement resources SWEPCO had selected to supply its future capacity requirements.<sup>93</sup>

#### **(iv) Failure to update the 2020 Analysis**

CARD, the Cooperatives, NACC, and TIEC also fault SWEPCO for failing to update the 2020 Analysis to account for changed circumstances.<sup>94</sup> In its analysis, SWEPCO assumed \$3.00 per million British thermal units (MMBtu) through 2025.<sup>95</sup> NACC emphasizes that, within a few months after SWEPCO decided to retire the Pirkey plant, natural gas prices jumped to \$8.98 per MMBtu in 2021 and \$6.40 per MMBtu in 2022.<sup>96</sup> Likewise, the Cooperatives point to “extreme volatility shifts, both up and down, particularly during Winter Storm Uri in February 2021 and in the current and forward natural gas prices.”<sup>97</sup> Nevertheless, SWEPCO did not re-evaluate its November 2020 decision to retire the Pirkey plant.<sup>98</sup> Without such an update, NACC argues, SWEPCO’s reliance on the “stale and outdated data” in the 2020 Analysis is insufficient and imprudent.<sup>99</sup> Similarly, CARD contends that natural gas prices regained their volatility during the Reconciliation Period, which would have caused a prudent operator to update the 2020 Analysis.

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<sup>93</sup> CARD Ex. 1A (Norwood Dir.) at 16, Table 2 (HSPM).

<sup>94</sup> CARD Initial Brief at 3-4, 10; Cooperatives Initial Brief at 5; NACC Initial Brief at 4-8; TIEC Initial Brief at 5.

<sup>95</sup> NACC Ex. 1 (Schwartz Dir.) at 17-18.

<sup>96</sup> *Id.*

<sup>97</sup> Cooperatives Initial Brief at 5; Cooperatives Ex. 1 (Striedel Dir.) at 12.

<sup>98</sup> NACC Ex. 1 (Schwartz Dir.), Exh. SS-DT-4 (SWEPCO Response to CARD RFI No. 1-9 in Docket No. 53625).

<sup>99</sup> NACC Initial Brief at 5.

NACC also contends that SWEPCO should have re-evaluated its analysis due to reliability and resilience issues exposed by Winter Storm Uri in 2021, supply chain issues delaying the construction and completion of new power projects, increased construction costs of said power projects due to record inflation, and the passage of the Inflation Reduction Act in 2022, which included clean energy investments.<sup>100</sup>

In addition, TIEC criticizes SWEPCO's failure to update the analysis after capital costs for wind and solar resources increased by 10% to 22%.<sup>101</sup>

#### **(v) Reliability, option value, and transmission costs**

Intervenors also criticize SWEPCO's 2020 Analysis for failing to consider other potential benefits of keeping the Pirkey plant in service.

First, CARD, the Cooperatives, and NACC raise concerns that the analysis did not evaluate the reliability benefits of maintaining the Pirkey plant.<sup>102</sup> CARD contends that the analysis failed to consider the long-term reliability and capacity value of maintaining the plant in operation. For example, SWEPCO's 580 MW ownership share of the Pirkey plant would more than displace the need for the Company's proposed acquisition of new wind and solar resources for approximately \$2.2 billion. Similarly, the Cooperatives emphasize that SWEPCO, as a regulated

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<sup>100</sup> NACC Ex. 1 (Schwartz Dir.), Exh. SS-DT-3 at 2-3.

<sup>101</sup> TIEC Initial Brief at 5; TIEC Ex. 1 (Pollock Dir.) at 17.

<sup>102</sup> CARD Initial Brief at 5-6; Cooperatives Initial Brief at 5-6, 15; NACC Initial Brief at 1-2, 7.

integrated electric utility, has an obligation to serve its customers reliably.<sup>103</sup> However, the retirement of the Pirkey plant reduced SWEPCO's portfolio of dispatchable generation, which negatively impacts reliability in the event of another major winter storm.<sup>104</sup>

Second, CARD contends that SWEPCO's analysis did not consider the option value of maintaining the Pirkey plant in operation.<sup>105</sup> Mr. Norwood explained that "option value" represents the value of maintaining a generating asset in service as a hedge against future fuel or market price uncertainty and volatility such as occurred in Winter Storm Uri, as well as uncertainties in forecasts of future capacity requirements and replacement resource costs.<sup>106</sup> By keeping the Pirkey plant in service, SWEPCO would also retain the option of eventually converting it to burn natural gas, or to install new gas-fired or renewable energy resources at the existing Pirkey site, depending on future conditions.<sup>107</sup>

Third, CARD contends that SWEPCO's analysis did not consider the potentially significant cost of transmission-system improvements that could be necessary to maintain reliability of the SPP grid if the 675 MW Pirkey plant is retired and not replaced with other dispatchable generation.<sup>108</sup>

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<sup>103</sup> Cooperatives Initial Brief at 5-6, 15.

<sup>104</sup> *Id.* at 5-6.

<sup>105</sup> CARD Initial Brief at 6.

<sup>106</sup> CARD Ex. 1 (Norwood Dir.) at 14.

<sup>107</sup> *Id.*

<sup>108</sup> CARD Initial Brief at 6-7.

## **b) SWEPCO's motivations for retiring the Pirkey plant**

The Cooperatives, NACC, and TIEC question SWEPCO's motives for retiring the Pirkey plant.<sup>109</sup> NACC and TIEC argue that retirement of coal-fired generation, like the Pirkey plant, is driven by the decarbonization and economic, social, and governance goals of SWEPCO's parent company, AEP, rather than benefits to SWEPCO's ratepayers. In particular, AEP has goals to halve its coal capacity by 2030, reduce its carbon emissions by 80% by 2030 (relative to 2005 levels), and reduce carbon emissions to net-zero by 2045.<sup>110</sup> In presentations to investors, AEP listed the Pirkey plant among the coal plants that would be retired and touted that its "SWEPCO Generation Replacement Plan" to retire fossil fuel generation, including the Pirkey plant in 2023, would help to "drive[] a capacity need" and "create[] a renewable energy and dispatchable resource replacement opportunity."<sup>111</sup>

AEP also ties SWEPCO's executive compensation to an increase in renewable generation. Specifically, AEP's long-term incentive plan gives a 10% weight to achieving certain goals for increasing "carbon free capacity," including nuclear, hydro, wind, solar, demand-side management, and energy storage.<sup>112</sup> As a result, intervenors contend that retiring the Pirkey plant made room for SWEPCO to seek approval to acquire \$2.2 billion in renewable generation that would increase

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<sup>109</sup> Cooperatives Initial Brief at 15-17; NACC Initial Brief at 13, 19; TIEC Initial Brief at 5-6.

<sup>110</sup> TIEC Ex. 1 (Pollock Dir.) at 6; TIEC Ex. 1B (Pollock Workpapers) at 19, 21, 33.

<sup>111</sup> TIEC Ex. 1 (Pollock Dir.) at 7.

<sup>112</sup> Cooperatives Ex. 29 (AEP Long-Term Incentive Plan 2020-2022 Performance Share Statement) at 2, 19.

SWEPCO's executive compensation, while also increasing shareholder returns by increasing rate base.<sup>113</sup>

**c) Alternatives to retiring the Pirkey plant in 2023**

CARD, the Cooperatives, and NACC also argue that SWEPCO failed to consider lower cost or no-cost options to continue operating the Pirkey plant.<sup>114</sup> First, they note that the cost to simply retrofit the Pirkey plant's two CCR surface impoundments (the EBAP and WBAP) to comply with the CCR Rule and ELG was only \$40.6 million, or \$3 per MWh.<sup>115</sup> In comparison, they emphasize that SWEPCO requested regulatory approval from the Commission to spend \$2.2 billion on renewable generation to replace less than half of the accredited capacity that would be lost by retiring the Pirkey plant early. In CARD's view, complying with the CCR/ELG requirements would have been a small price to pay for the ability to retain 675 MW of inexpensive, dispatchable power.<sup>116</sup>

As another option, the Cooperatives and NACC contend that SWEPCO, at a minimum and at no cost, could have extended the Pirkey plant's retirement date by five years. This, they argue, could be achieved under the CCR Rule by designating

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<sup>113</sup> Cooperatives Initial Brief at 17.

<sup>114</sup> CARD Initial Brief at 9-10; Cooperatives Initial Brief at 6-14; NACC Initial Brief at 11-19.

<sup>115</sup> NACC Ex. 4 (SWEPCO Response to CARD RFI 1-8) ("The estimated compliance cost included in the 2020 CCR/ELG analysis for the CCR and ELG rules combined was \$40.6 million."); SWEPCO Ex. 16 (Martin Reb.) at 6; *see also* Cooperatives Ex. 1 (Striedel Dir.) at 15 (testifying that, in SWEPCO's 2021 rate case in Arkansas, SWEPCO estimated the combined CCR/ELG compliance cost for the Pirkey plant to be roughly \$43.2 million).

<sup>116</sup> CARD Initial Brief at 3.

the two CCR ponds as a single CCR pond system that was greater than 40 acres.<sup>117</sup> As noted above, the deadline for plant closure under the CCR Rule varies depending on the size of the CCR impoundments. For plants with impoundments of 40 acres or less, the deadline is October 17, 2023, and for plants with impoundments larger than 40 acres, the deadline is October 17, 2028.<sup>118</sup>

The Cooperatives and NACC contend that the aggregation of the CCR ponds is contemplated by the CCR Rule's definition of "CCR unit," which "means any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, *or a combination of more than one of these units*, based on the context of the paragraph(s) in which it is used."<sup>119</sup> They note that the EBAP and WBAP are hydraulically connected by a pipe that runs through a shared separator dike.<sup>120</sup> And, although they do not work in a series, with one flowing into the other, NACC contends that they work in coordination, with one pond operating as the "active" pond while the other is being drained, dredged, and prepared to operate again.<sup>121</sup> SWEPCO itself has characterized the two ponds as a single system in other contexts, including its 2022 Texas Commission on Environmental Quality application for CCR waste management,<sup>122</sup> as well as its Texas Pollutant Discharge Elimination System

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<sup>117</sup> Cooperatives Initial Brief at 13; NAAC Initial Brief at 14.

<sup>118</sup> 40 C.F.R. § 257.103(f)(2)(iv); *see also* SWEPCO Ex. 14 (Spitznogle Reb.) at 5-6; NACC Ex. 1 (Schwartz Dir.) at 9.

<sup>119</sup> 40 C.F.R. § 257.53 (emphasis added); Cooperatives Initial Brief at 13; NAAC Initial Brief at 14.

<sup>120</sup> Cooperatives Ex. 1 (Striedel Dir.) at 16.

<sup>121</sup> NACC Reply Brief at 14; Tr. Vol. 3 at 78-80.

<sup>122</sup> Cooperatives Ex. 22 at 21-22 (PDF pages) (representing both ponds as the "Ash Pond System" on the Schematic of Water Flow diagram, with the same notice of registration numbers).

(TPDES) permit,<sup>123</sup> Annual Dam and Dike Inspection Reports,<sup>124</sup> and annual CCR Fugitive Dust Control Reports.<sup>125</sup>

The Cooperatives and NACC fault SWEPCO for not even attempting to reclassify the ponds as a single system. They note that, regardless of the merits of such a request, it would have tolled the deadline for closure.<sup>126</sup> In other words, even if the EPA ultimately determined that the Pirkey plant's impoundment system was properly characterized as two separate impoundments under the CCR Rule, SWEPCO's filing of the required documentation with the EPA would have tolled the compliance deadline, thus allowing Pirkey to continue operating.<sup>127</sup>

NACC also challenges SWEPCO's contention (discussed below) that EPA staff represented that the 2023 closure deadline applied. NACC points out that no documentation supports that such conversations occurred, and, on cross-examination, SWEPCO witness Gary Spitznogle, who oversees environmental compliance for the AEP operating companies, acknowledged that he was not present

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<sup>123</sup> Cooperatives Exs. 6, 8, 9, and 10 at Other Requirement No. 5 (2013, 2017, 2018, and 2022 TPDES permits listing the ponds as a single line item with a surface area of 71.76 acres).

<sup>124</sup> Cooperatives Exs. 16, 17, 18, 19, and 20 (2017 to 2021 reports describing the ponds as the "Bottom Ash Pond Complex" in the 2017 and 2018 reports and "CCR Ponds Complex" in the later reports).

<sup>125</sup> Cooperatives Exs. 11, 12, 13, 14, and 15 at Section 3.0 (2018 to 2022 reports describing the ponds as the "Bottom Ash Pond").

<sup>126</sup> Tr. Vol. 3 at 84.

<sup>127</sup> Tr. Vol. 3 at 84; Cooperatives Initial Brief at 10.

for the conversations; one of the conversations related to a different power plant (Dolet Hills); and the substance of the consultations was not binding on the EPA.<sup>128</sup>

In addition, the fact that the WBAP is currently closed, NACC argues, is not relevant to whether SWEPCO's initial decision to retire the Pirkey plant was prudent.<sup>129</sup> Moreover, Mr. Spitznogle testified that the original shape of the WBAP has been maintained, aside from the fact that its dike has been breached, and the only additional action necessary to retrofit the WBAP to comply with the CCR Rule is for the pond to be lined.<sup>130</sup> The Cooperatives also maintain that the final closure of the Pirkey plant's ponds has not been certified to the EPA, nor has the EPA taken formal action on SWEPCO's November 2020 filing; thus, insufficient evidence exists to conclude that it is too late to change course.<sup>131</sup>

The Cooperatives and NACC argue that, in 2021, in light of changing conditions, including rising natural gas prices, SWEPCO had a responsibility to revisit its decision to retire the Pirkey plant and to amend its filing with the EPA to reclassify the plant's impoundments as a single CCR unit. They contend that precedent for such an amended filing exists.<sup>132</sup> Specifically, the Miami Fort Power Station (Miami Fort) near North Bend, Ohio, has a CCR surface impoundment system comprised of Basin A and Basin B, which are 30 acres and 20 acres,

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<sup>128</sup> Tr. Vol. 3 at 73-74.

<sup>129</sup> NACC Reply Brief at 12-13.

<sup>130</sup> Tr. Vol. 3 at 77-78.

<sup>131</sup> Cooperatives Reply Brief at 6.

<sup>132</sup> Cooperatives Initial Brief at 11; NAAC Initial Brief at 16.

respectively, and are hydraulically connected via a 40-inch pipe that runs through a separator dike between the cells. In Miami Fort's initial filing with the EPA, the pond system was categorized as consisting of two impoundments that were less than 40 acres, but a request was later made to reclassify the ponds as a single system and extend the deadline for the plant's closure.<sup>133</sup> The EPA issued a letter tolling the deadlines until it issues a final decision on the request,<sup>134</sup> which as of the date of hearing, had not yet occurred.<sup>135</sup>

The Cooperatives contend that requesting an extension was the "least cost option" and would have allowed SWEPCO to more effectively wind down the Pirkey plant and its mining; mitigate much of the additional lignite costs in the Reconciliation Period to be borne by ratepayers; defer a \$2.2 billion investment in renewable resources; and eliminate the need for SWEPCO to make costly short-term capacity purchases.<sup>136</sup> Likewise, NAAC contends that seeking the 2028 deadline would have provided SWEPCO with additional time to operate the plant and to consider changing circumstances, such as rising natural gas prices during the Reconciliation Period and beyond.<sup>137</sup>

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<sup>133</sup> Cooperatives Ex. 1 (Striedel Dir.) at 17-18, Exh. JES-3.

<sup>134</sup> Cooperatives Ex. 1 (Striedel Dir.), Exh. JES-4.

<sup>135</sup> Tr. Vol. 3 at 85.

<sup>136</sup> Cooperatives Initial Brief at 17.

<sup>137</sup> NAAC Initial Brief at 15.

### **3. SWEPCO's rebuttal**

#### **a) Inputs to the 2020 Analysis**

As an initial matter, SWEPCO notes that no party presented evidence demonstrating that customers would be better off incurring the fuel costs, operations and maintenance costs, and capital costs associated with the continued operation of the Pirkey plant.<sup>138</sup>

Regarding the specific inputs to the analysis, SWEPCO contends that the claims that the 2020 Analysis used “outdated” or “stale” data is mostly based on the fact that natural gas prices were temporarily elevated after Winter Storm Uri in 2021.<sup>139</sup> However, natural gas prices have since declined. The following chart illustrates gas prices since 2010, showing that the rise in prices triggered by global events in 2021 and 2022 has abated.<sup>140</sup>

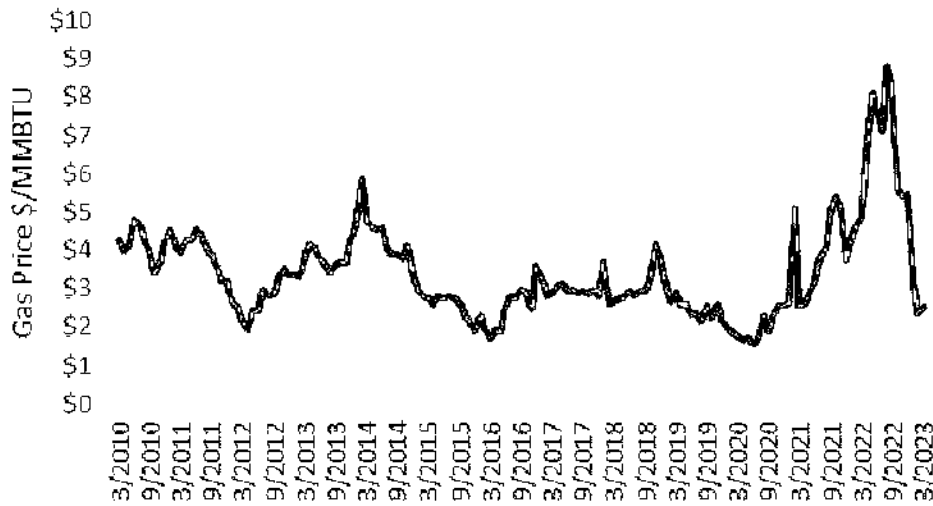
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<sup>138</sup> SWEPCO Reply Brief at 5.

<sup>139</sup> *Id.* at 12-16.

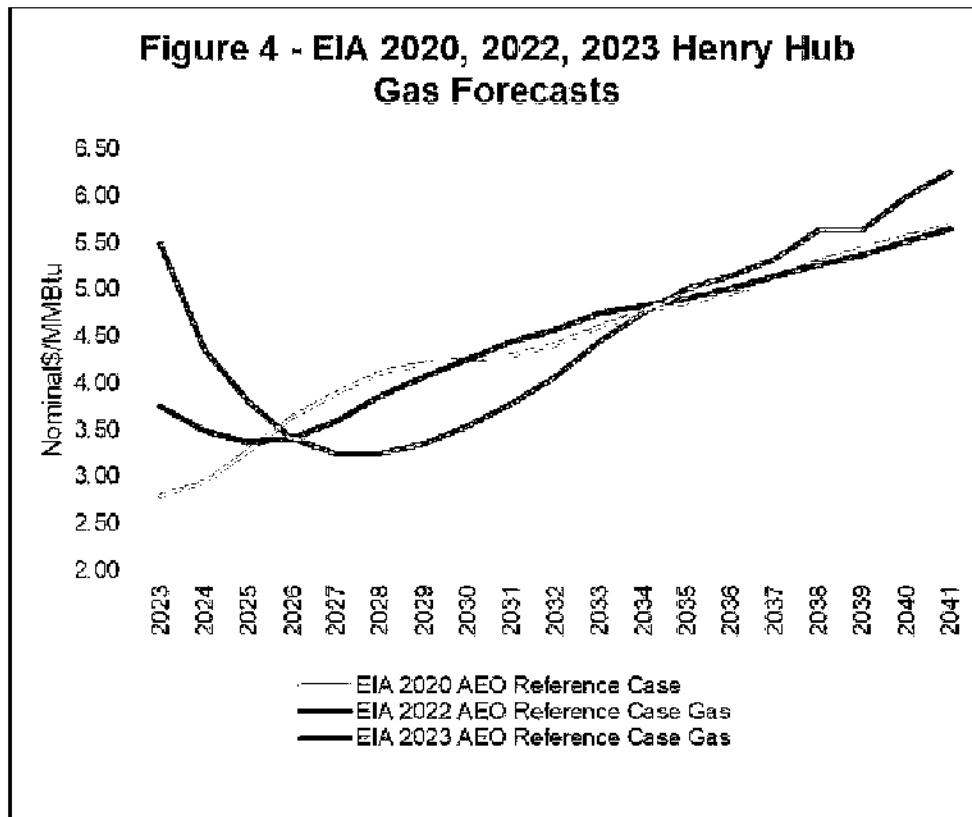
<sup>140</sup> SWEPCO Ex. 16 (Martin Reb.) at 10-11.

Figure 2 - Henry Hub Monthly Average Spot Price



SWEPCO also contends that more recent natural gas price forecasts support that this spike was temporary. The 2020 Analysis used the Energy Information Administration's (EIA) 2020 Annual Energy Outlook (AEO) gas price forecast. A comparison of that forecast to the 2022 and 2023 AEO forecasts shows that the EIA expects that, by the 2025 to 2026 timeframe, gas prices will return to the levels it forecasted in 2020:<sup>141</sup>

<sup>141</sup> SWEPCO Ex. 16 (Martin Reb.) at 12-13.



As shown, in the 2022 forecast, EIA projected that prices would fall slightly below the 2020 analysis curve until 2030 and then be nearly identical through 2041. In the 2023 forecast, EIA projected gas prices that are significantly lower than the 2020 forecast from 2026 through 2033. By 2035, all of the curves converge. Given these updates, SWEPCO concludes that it would not be prudent to plan on gas prices being sustained at the 2022 levels over the long term.<sup>142</sup>

SWEPCO also disputes that its 2020 Analysis considered only a single natural gas price forecast.<sup>143</sup> Mr. Martin testified that, at that time, the Company also

<sup>142</sup> SWEPCO Reply Brief at 14.

<sup>143</sup> *Id.* at 15-16.

prepared low and high gas fundamental forecasts in which gas was assumed to be one standard deviation above and below the base forecast used in the analysis.<sup>144</sup> This amounted to a 15% change in the gas price, which resulted in a 12% change in the power prices between the base and high fundamentals cases. A 15% increase was roughly a \$0.75 per MMBtu average increase, and a \$4.50 per MWh average increase in the energy price the Pirkey plant would have received.<sup>145</sup> Mr. Martin noted that the higher energy price would also have applied to the other generation alternatives available to the model. In his opinion, this small change in power prices would not have materially impacted the Pirkey plant's capacity factor or profitability, nor would a higher gas price case have materially impacted the analysis in general.<sup>146</sup>

In response to allegations that the 2020 Analysis assumed an inappropriately low capacity factor, SWEPCO contends that the capacity factor cannot be viewed in isolation—the Pirkey plant's value versus other options can only be ascertained through a unit disposition analysis, like the 2020 Analysis, that accounts for all the costs that can be avoided by retiring a unit, including all fuel and non-fuel operating and capital costs.<sup>147</sup> Nevertheless, in rebuttal testimony, SWEPCO witness Martin performed an additional analysis assuming that the Pirkey plant ran at a 50% capacity factor every year through 2045 without experiencing any reduction in energy revenues or energy margin (energy revenues minus variable fuel and other variable

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<sup>144</sup> SWEPCO Ex. 16 (Martin Reb.) at 9.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> SWEPCO Reply Brief at 16-18.

production costs) per MWh.<sup>148</sup> The assumed capacity factor of 50% is close to what the Pirkey plant operated at in 2022 when power prices were high. Although the economics of the Pirkey plant improve with the higher capacity factor, the analysis continues to show savings of retiring the plant. Specifically, the net present value of the savings of retiring the Pirkey plant would be \$226 million in the No Carbon scenario and \$393 million in the Including Carbon scenario, while the nominal savings would be \$479 million in the No Carbon scenario and \$1.030 billion in the Including Carbon scenario.<sup>149</sup>

SWEPSCO also disagrees that the Pirkey plant was a hedge against higher natural gas prices, which CARD refers to as “option value.” In SWEPSCO’s view, such claims ignore the rising cost of fuel at the Pirkey plant, which in turn reduced the plant’s value as a hedge against natural gas prices. The higher fuel costs are even recognized in NACC witness Seth Schwartz’s testimony from SWEPSCO’s last fuel reconciliation case, Docket No. 50997, in which he provided a table showing the increasing fuel costs at the Pirkey plant from 2010 to 2019.<sup>150</sup> His table showed the total fuel costs for the plant as being higher than all other SWEPSCO solid-fueled plants except for Dolet Hills, which has since been retired.<sup>151</sup>

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<sup>148</sup> SWEPSCO Ex. 16 (Martin Reb.) at 20-21.

<sup>149</sup> *Id.* at 21, Table 3.

<sup>150</sup> SWEPSCO Ex. 32 (Docket No. 50997, Schwartz Dir.) at 15, Table 9.

<sup>151</sup> SWEPSCO Ex. 32 (Docket No. 50997, Schwartz Dir.) at 15, Table 9; SWEPSCO Reply Brief at 19.

SWEPCO witness Martin also testified that whether the Pirkey plant gets dispatched is determined by SPP, not SWEPCO.<sup>152</sup> SPP Integrated Market participant generators offer in their units based on the incremental cost of production, and then SPP determines which units get dispatched in merit order across the region. When gas prices and power prices are low, relative to the Pirkey plant's fuel costs, the plant does not dispatch, and all of the fixed costs at both the plant and the mine get spread over fewer MWh.<sup>153</sup>

Finally, regarding TIEC's criticisms of using a carbon sensitivity analysis, SWEPCO points out that, even under the No Carbon scenario, customers are projected to save more than \$700 million.<sup>154</sup>

#### **b) Reliability**

SWEPCO also disagrees with intervenors that the retirement of the Pirkey plant may compromise SWEPCO's ability to provide reliable service to its customers. According to SWEPCO, this implication is grounded in the assumption that only coal- and gas-fired generation contribute to system reliability.<sup>155</sup>

While the Cooperatives claim that the retirement of the Pirkey plant negatively impacts reliability in the event of another major winter storm, SWEPCO

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<sup>152</sup> SWEPCO Ex. 16 (Martin Reb.) at 32.

<sup>153</sup> *Id.* at 32-33.

<sup>154</sup> SWEPCO Reply Brief at 5.

<sup>155</sup> *Id.* at 23.

counters that recent experience in SPP shows otherwise. A recent SPP study evaluated 2022's Winter Storm Elliott and 2021's Winter Storm Uri and showed that gas- and coal-fired generation units were available to serve load at levels that were significantly below the SPP accredited capacity for these types of units.<sup>156</sup> In contrast, the study showed that wind generation units were available to serve load in or significantly above the SPP accredited capacity for these types of units. Accordingly, SWEPCO emphasizes that all types of generation play a role in supporting system reliability.<sup>157</sup>

SWEPCO also notes that it will continue to rely heavily on fossil-fired resources into the future.<sup>158</sup> In terms of SPP accredited capacity, the total percentage of fossil-fueled capacity (gas plus coal) is projected to remain high at 79% in 2029 and 83% in 2041, even with the addition of the renewable resources SWEPCO sought to acquire in Docket No. 53625.<sup>159</sup> The total nameplate MW of fossil-fueled resources for SWEPCO is 4,500 MW in 2024, 4,200 MW in 2029, and 4,300 MW in 2041.<sup>160</sup>

SWEPCO also disagrees that the 2020 Analysis did not consider the “capacity value of maintaining Pirkey in operation.” In the analysis, the Pirkey plant’s capacity

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<sup>156</sup> SWEPCO Ex. 16 (Martin Reb.) at 25, Exh. JFM-R2.

<sup>157</sup> SWEPCO Reply Brief at 24.

<sup>158</sup> *Id.*

<sup>159</sup> SWEPCO Ex. 16 (Martin Reb.) at 26. Given that the Commission did not approve the renewable resources at issue in Docket No. 53625, these percentages of fossil-fueled capacity may ultimately be higher.

<sup>160</sup> SWEPCO Reply Brief at 24.

value was captured as an avoided capacity cost.<sup>161</sup> Regarding CARD's contention that the analysis did not consider the cost of transmission system improvements that could be necessary to maintain reliability of the SPP grid, SWEPCO responds that the Company determined in 2020 that no transmission investment would have been required prior to retiring the plant, and SPP affirmed that determination with its official retirement study.<sup>162</sup>

### **c) Carbon emissions goals**

SWEPCO also disputes that its decision to retire the Pirkey plant was driven by AEP's carbon emissions goals or incentive compensation plan.<sup>163</sup> As explained by SWEPCO witness Lynn Ferry-Nelson, advancing the carbon emissions reduction goal and making decisions that economically benefit customers are not mutually exclusive.<sup>164</sup> Additionally, SWEPCO maintains that no evidence supports an inference that the retirement of the Pirkey plant was due to SWEPCO's executives' compensation being tied to increased renewable generation. To the contrary, SWEPCO asserts that AEP only retires plants when it makes economic sense for customers. For example, SWEPCO emphasizes that AEP's analysis of the CCR and ELG compliance costs resulted in AEP choosing to make the compliance investments at four of the six plants included in the study. These investments would not have been made if AEP were indiscriminately closing coal plants to achieve its

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<sup>161</sup> SWEPCO Ex. 16 (Martin Reb.) at 16.

<sup>162</sup> SWEPCO Reply Brief at 25; SWEPCO Ex. 16 (Martin Reb.) at 31.

<sup>163</sup> SWEPCO Reply Brief at 20-23.

<sup>164</sup> SWEPCO Ex. 12 (Ferry-Nelson Reb.) at 20.

carbon emissions reduction goal. The AEP presentations relied on by intervenors do not show otherwise, according to SWEPCO.<sup>165</sup>

SWEPCO explains that, while it is true that AEP has had carbon emissions reduction goals since the early 2000s, neither AEP nor SWEPCO have a policy of retiring solid fuel power plants in order to replace them with renewable resources. Instead, AEP's coal plant retirements are based on robust economic analyses.<sup>166</sup> SWEPCO witness Martin testified that it should come as no surprise that AEP has retired coal plants.<sup>167</sup> He stated that plants are being retired for many reasons, most of them related to market forces and environmental regulations. This is consistent with NACC witness Schwartz's observation that 125,000 MW of coal-fired power plants across the country either retired or converted to burn gas between 2012 and 2022.<sup>168</sup>

#### **d) Alleged alternatives to retiring the Pirkey plant**

SWEPCO characterizes arguments that it could have simply made the CCR/ELG retrofits as a "red herring."<sup>169</sup> The focus on compliance costs sidesteps the real issue with continued operation of the Pirkey plant—i.e., its high fuel and

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<sup>165</sup> SWEPCO Reply Brief at 20-23.

<sup>166</sup> SWEPCO Ex. 16 (Martin Reb.) at 24-25.

<sup>167</sup> *Id.* at 26.

<sup>168</sup> NACC Ex. 1 (Schwartz Dir.) at 24.

<sup>169</sup> SWEPCO Reply Brief at 28.

operating costs.<sup>170</sup> As noted above, SWEPCO contends that its 2020 Analysis demonstrated that continued operation of the Pirkey plant through 2028 or later would be more expensive for customers even if there were zero costs for CCR and ELG compliance.<sup>171</sup>

SWEPCO also contends that aggregating the Pirkey plant's CCR ponds to obtain an extension of the plant's closure to 2028 is neither practical nor viable under the CCR Rule for three reasons:

1. One of the Pirkey plant's surface impoundment ponds (the WBAP) is closed.<sup>172</sup> Thus, there are not two ponds to aggregate or reclassify as a single surface impoundment over 40 acres.
2. The redundant nature of the two surface impoundments makes them ineligible for aggregation.<sup>173</sup> The two ponds are independent and distinct ash disposal units regulated separately by the CCR Rule.
3. Even assuming both of the Pirkey plant's surface impoundment ponds were open, in order to obtain the longer extension, SWEPCO would have to submit to the EPA a demonstration that the Pirkey plant's ponds qualify as a "CCR surface

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<sup>170</sup> SWEPCO Ex. 16 (Martin Reb.) at 6 ("Fuel and other operating costs were the primary reason the Company decided to retire Pirkey.").

<sup>171</sup> *Id.* at 17.

<sup>172</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 12; *see also* NACC Ex. 5 (SWEPCO Response to NACC RFI 1-6 ("As of July of 2022, the WBAP has been dewatered and all of the bottom ash has been removed by excavation, along with an additional foot of soil. The ash has been transported by truck to the landfill. The WBAP dike was breached and the pipes that were used to sluice bottom ash to the pond were capped, making actual sluicing impossible. The pond surface has been seeded with vegetative cover. As a result, the WBAP is no longer a "pond" as it is no longer able to hold water.").

<sup>173</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 7.

impoundment that is larger than 40 acres.”<sup>174</sup> The EPA, however, has already confirmed that it would reject such a change.<sup>175</sup>

SWEPCO witness Spitznogle testified that SWEPCO consulted EPA staff twice regarding the option of aggregating the CCR ponds, once regarding the two CCR ponds at Dolet Hills sometime before SWEPCO submitted its November 2020 filings to the EPA, and once specifically regarding the two CCR ponds at the Pirkey plant on January 18, 2023.<sup>176</sup> SWEPCO acknowledges that the first conversation related to Dolet Hills.<sup>177</sup> However, that plant’s ponds had a similar configuration to the Pirkey plant’s ponds, and EPA’s informal guidance was consistent with Mr. Spitznogle’s understanding of the CCR Rule and his experience, including in his current role as Vice President for Environmental Services at the American Electric Power Service Company, where he oversees environmental support for all generation and energy delivery facilities owned by AEP’s operating companies.<sup>178</sup>

SWEPCO also disagrees that the second EPA conversation should be disregarded because it occurred outside of the Reconciliation Period or because

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<sup>174</sup> 40 C.F.R. § 257.103(f)(2)(iv)-(v).

<sup>175</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 7, 10.

<sup>176</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 7, 10; Tr. Vol. 3 at 73.

<sup>177</sup> SWEPCO Reply Brief at 29.

<sup>178</sup> Prior to serving in this role, Mr. Spitznogle served as American Electric Power Service Company’s Managing Director of Coal Combustion Residuals Management. SWEPCO Ex. 14 (Spitznogle Reb.) at 1.

Mr. Spitznogle did not personally attend the meeting.<sup>179</sup> The Cooperatives' allegations of imprudence are not limited to SWEPCO's 2020 decision to retire the Pirkey plant and they insist that SWEPCO should, at this time, seek authorization from the EPA to reclassify the Pirkey plant's CCR ponds. Given that the EPA indicated it would reject such a filing, SWEPCO asserts that the guidance is relevant to the Cooperatives' position in this case. Further, although Mr. Spitznogle was not present at the meeting, SWEPCO notes that it is not uncommon and is often necessary for those in managerial or oversight positions like Mr. Spitznogle to rely on information gathered from members of their support team, which is what occurred here.<sup>180</sup> Additionally, as an expert witness, Mr. Spitznogle is not required to have first-hand knowledge of every fact relied on in forming his opinion.<sup>181</sup>

SWEPCO acknowledges that the informal guidance was not binding on the EPA. However, SWEPCO maintains that conversations with EPA personnel who are tasked with promulgating and enforcing the CCR Rule should be considered in forming an opinion regarding the application of that rule.<sup>182</sup>

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<sup>179</sup> SWEPCO Reply Brief at 30-31 (citing Cooperatives Initial Brief at 13; NACC Initial Brief at 14-15).

<sup>180</sup> Tr. Vol. 3 at 72-73.

<sup>181</sup> See, e.g., *Notice of Intent to Assess an Administrative Penalty by the Office of Customer Protection Against Axces, Inc. for Continued Violations of PUC Substantive R. § 26.130, Selection of Telecommunications Utilities, Pursuant to Procedural Rule 22.246, Administrative Penalties*, Docket No. 20934, Supplemental Proposal for Decision at 39 (July 23, 2002) ("Seldom do experts have first hand knowledge. They must base their opinion on the first hand knowledge of others.").

<sup>182</sup> The EPA personnel who participated in SWEPCO's January 18, 2023 conversation included the Chief of the Energy Recovery and Waste Disposal Branch, Office of Resource Conservation and Recovery; a Senior Attorney with the Solid Waste and Emergency Response Law Office, Office of General Counsel; an Environmental Engineer, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division; and an Environmental Specialist, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division. Cooperatives Ex. 3 (SWEPCO Response to Cooperatives RFI No. 1-3).

SWEPCO also disputes claims that it failed to consider reclassifying the CCR ponds.<sup>183</sup> Mr. Spitznogle testified that SWEPCO “considered all of its reasonable CCR Rule compliance options, including a scenario in which the ponds were treated as a single pond in excess of 40 acres.”<sup>184</sup> The fact that the Cooperatives and NACC disagree with Mr. Spitznogle’s conclusion that aggregation of the Pirkey plant’s ponds was (and still is) not a viable option does not translate into a failure on SWEPCO’s part to exercise adequate due diligence.<sup>185</sup>

Further, SWEPCO disagrees that it should have sought aggregation of the ponds “regardless of the merits of the application” in order to toll the compliance deadline. In SWEPCO’s view, it is being criticized for acting “imprudently because it failed to game the EPA’s CCR Rule’s compliance process.” However, to obtain the longer extension, SWEPCO would have to submit to the EPA a demonstration that the Pirkey plant’s ponds qualify as a “CCR surface impoundment that is larger than 40 acres,” which it could not legitimately certify given the EPA’s guidance. SWEPCO asserts that it could not knowingly certify and file a demonstration with the EPA that mischaracterizes the nature of the Pirkey plant’s CCR ponds.<sup>186</sup>

SWEPCO maintains that descriptions of the Pirkey plant’s bottom ash ponds as part of a “system” in materials prepared for reports, permits, and regulations

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<sup>183</sup> SWEPCO Reply Brief at 32-33.

<sup>184</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 7.

<sup>185</sup> SWEPCO Reply Brief at 32.

<sup>186</sup> *Id.* at 33-34.

unrelated to the CCR Rule's closure requirements are neither relevant to nor determinative of whether the Pirkey plant's ponds can be classified as a "CCR surface impoundment that is larger than 40 acres" under the CCR Rule.<sup>187</sup> As explained by Mr. Spitznogle, different regulations have different purposes, which, in turn, require different perspectives on the ponds.<sup>188</sup> Further, as noted above, the EPA has confirmed that the Pirkey plant's EBAP and WBAP do not qualify as a single "CCR surface impoundment that is larger than 40 acres" for purposes of the CCR Rule's retirement provision extension.<sup>189</sup>

In addition, the Miami Fort example given by the Cooperatives and NACC is neither precedent nor analogous, according to SWEPCO.<sup>190</sup> The EPA has not approved the facility's proposed aggregation of its surface impoundment ponds as a single CCR unit. Instead, the EPA has deemed the facility's application complete, but has also communicated that the request has not been approved and must undergo further review.<sup>191</sup> Moreover, the Miami Fort pond system is distinguishable from the Pirkey plant's system. The ponds at the Pirkey plant are separate and redundant units and not simultaneously necessary.<sup>192</sup> For example, the EBAP discharge does

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<sup>187</sup> *Id.*

<sup>188</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 9.

<sup>189</sup> SWEPCO Reply Brief at 34.

<sup>190</sup> *Id.* at 34-35.

<sup>191</sup> Cooperatives Ex. 1 (Striedel Dir.), JES-4 (EPA Response Letter to Dynegy Miami Fort (Jan. 11, 2022) ("This letter merely communicates EPA's determination that your submitted demonstration contains sufficient information for EPA to evaluate the merits of your demonstration. EPA has not made any decision on whether to approve your request. The demonstration will undergo further review to make such a determination."))).

<sup>192</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 11.

not subsequently flow into the WBAP before it leaves the plant site. Instead, it flows directly toward the plant site discharge system immediately following treatment in the EBAP, and vice versa for the WBAP. In contrast, the Miami Fort pond system operates in series—i.e., the ponds operate sequentially, as Step 1 and Step 2 of the treatment system. Consequently, the discharge from Miami Fort’s first pond, by necessity of design and operation, flows into its second pond before it is discharged from the plant. Thus, even if the EPA eventually approves the Miami Fort’s pond aggregation, it would not offer insight into how the EPA would rule on the proposed reclassification of the Pirkey plant’s ponds.<sup>193</sup>

Finally, although the Cooperatives note that the CCR Rule does not prohibit SWEPCO from pursuing an alternative closure path, the issue, according to SWEPCO, is not whether it can change course with regard to retiring the Pirkey plant, but rather whether doing so would be beneficial to customers. In SWEPCO’s view, continued operation of the Pirkey plant is not justified as it would increase costs to customers by hundreds of millions of dollars as compared to other alternatives reasonably available to the Company.<sup>194</sup>

#### **D. ALJS’ ANALYSIS**

Under the Commission’s prudence standard, the reasonableness of a utility’s action or decision “must be judged in light of the circumstances, information, and

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<sup>193</sup> SWEPCO Reply Brief at 35.

<sup>194</sup> *Id.* at 36.

available options existing at the time, without the benefit of hindsight.”<sup>195</sup> Therefore, in evaluating the prudence of SWEPCO’s decision to retire the Pirkey plant, the ALJs begin by considering the information available to SWEPCO at the time it had to make its decision.

There is no dispute that SWEPCO was required to take some action in response to the EPA’s adoption of the CCR and ELG requirements. And, pursuant to the CCR Rule, SWEPCO was required to communicate its compliance elections to the EPA by November 30, 2020.<sup>196</sup> The parties in this case essentially present three options available to SWEPCO at the time: (1) make the required retrofits and continue operating the Pirkey plant until closer to the end of its projected useful life of 2045, (2) retire the Pirkey plant in 2023, or (3) seek an extension of the retirement of the plant to 2028 by designating the plant’s two CCR ponds as a single CCR unit.

Regarding the third option, the ALJs find that it was reasonable for SWEPCO not to request aggregation of the two CCR ponds. Whether the ponds would qualify for such treatment would depend on if they are a “CCR unit,” which is defined as “any CCR landfill, any CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these units, based on the context of the paragraph(s) in which it is used.”<sup>197</sup> While the Cooperatives and NACC focus on the language regarding a combination of units, the definition also makes clear that the classification depends on the context. No party has cited precedent interpreting this

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<sup>195</sup> *Nucor Steel*, 26 S.W.3d at 752; Docket No. 46449, Order on Rehearing at COL No. 16 (Mar. 19, 2018).

<sup>196</sup> 40 C.F.R. § 257.103(f)(3)(i).

<sup>197</sup> 40 C.F.R. § 257.53.

definition in this context (except for the Miami Fort application, which as discussed below, is not precedential). Thus, it is not clear whether the two CCR ponds could be designated as a single CCR unit.

The evidence shows that SWEPCO considered pond aggregation but concluded that it was not permissible under the CCR Rule.<sup>198</sup> This conclusion was consistent with the understanding of the rule held by SWEPCO witness Spitznogle, who has extensive experience in environmental compliance for the AEP operating system, including on this issue.<sup>199</sup> It was also consistent with informal guidance the Company received from EPA staff. Even recognizing that this guidance was not binding on the EPA—or was potentially even incorrect—it was not unreasonable for SWEPCO to rely on it.

The ALJs also find that SWEPCO's description of the ponds in other contexts is not determinative. As Mr. Spitznogle testified, the description of the ponds depends on the circumstances; for instance, the ponds are treated as a single unit for the discharge permit because they have a common discharge point located downstream of both ponds, and the discharge is the reason for the permit.<sup>200</sup> Thus, describing the two ponds as a system when seeking a discharge permit is immaterial here.

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<sup>198</sup> SWEPCO Ex. 14 (Spitznogle Reb.) at 7.

<sup>199</sup> *Id.* at 1.

<sup>200</sup> *Id.* at 9.

The Miami Fort example is also not controlling. Although the EPA confirmed that the Miami Fort application was administratively complete, it still had not acted on the merits of the request as of the date of the hearing in this case. Additionally, SWEPCO had valid reasons for believing the Pirkey plant's pond system was materially distinguishable because its two CCR ponds act as distinct, redundant units, rather than as sequential steps in the same process as is the case for the Miami Fort ponds.

The ALJs also agree with SWEPCO that it was not required to pursue aggregating the ponds "regardless of the merits of the application."<sup>201</sup> Under the CCR Rule, a utility must file a demonstration certifying that it qualifies for the extension it seeks.<sup>202</sup> SWEPCO could not rightly make this certification for an extension to 2028 given its understanding of the rule and the EPA's guidance.

Ultimately, the Commission's prudence standard considers the "select *range of options* which a reasonable utility manager would exercise or choose in the same or similar circumstances."<sup>203</sup> Given the circumstances, the ALJs conclude that treating the two CCR ponds as separate units under the CCR Rule was within the range of reasonable options and, therefore, was prudent.

The remaining two options—making retrofits to comply with the CCR and ELG requirements or retiring the Pirkey plant in 2023—were the subject of the

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<sup>201</sup> See NACC Initial Brief at 15.

<sup>202</sup> 40 C.F.R. § 257.103(f)(2)(v).

<sup>203</sup> *Gulf States*, 841 S.W.2d at 475 (emphasis added).

2020 Analysis. The primary argument that intervenors put forth for making the retrofits is that they were less expensive (\$40.6 million) than the estimated capital cost of \$2.2 billion for the renewable resources SWEPCO proposed to acquire in Docket No. 53625. While the difference in those numbers is stark, it does not necessarily follow that making the smaller investment was a sound economic decision. The 2020 Analysis was specifically intended to answer that question.

The 2020 Analysis projects significant savings to customers of retiring the Pirkey plant in 2023. Customers would save \$326.9 million (net present value) and \$739.4 million (nominal) under the No Carbon scenario.<sup>204</sup> The savings would be higher under the With Carbon scenario, though the ALJs give less weight to those results because there is no evidence that a carbon emissions tax was being considered, or was likely, at the time the analysis was prepared. The analysis also showed that continuing to operate the plant would be more expensive for customers even if there were zero costs for CCR and ELG compliance.<sup>205</sup>

However, the intervenors raise valid concerns with the analysis. It is concerning that, for such a major decision, it contained only one sensitivity analysis and did not model more than one natural gas price scenario. Utilities commonly consider multiple natural gas price scenarios, as SWEPCO has done in the past.<sup>206</sup> SWEPCO witness Martin testified that the Company prepared low and high gas

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<sup>204</sup> SWEPCO Ex. 16 (Martin Reb.) at 5.

<sup>205</sup> *Id.* at 17.

<sup>206</sup> *See* TIEC Ex. 1 (Pollock Dir.) at 18.

fundamental forecasts,<sup>207</sup> suggesting that SWEPCO considered other natural gas prices, but it is not clear why this information was not included in the 2020 Analysis. In addition, the capacity factor for the Pirkey plant used in the analysis (approximately 35%) was significantly below the capacity factor assumed in SWEPCO's 2018 and 2019 IRPs.<sup>208</sup> SWEPCO's explanation for the difference failed to identify how it selected the specific capacity factor, merely stating that it was "deemed to be a reasonable operating assumption."<sup>209</sup> Further, the assumed cost of coal was inflated by the use of 2019 costs, which were impacted by a plant outage.

Nevertheless, the ALJs find that SWEPCO sufficiently rebutted these concerns. There is no dispute that natural gas prices can be volatile. While it is clear that natural gas prices increased significantly just months after the 2020 Analysis, the initial spike in early 2021 (during the Reconciliation Period) appears to have been the result of Winter Storm Uri, an unexpected, isolated event.<sup>210</sup> Given the transitory nature of the cause, it was not unreasonable that SWEPCO did not re-run its analysis. In addition, natural gas prices have since declined from the highs experienced in 2021 and 2022, and the EIA's latest AEO forecasts show that, around 2025 to 2026, gas prices will return to the levels EIA forecasted in 2020.<sup>211</sup> Accordingly, it would not

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<sup>207</sup> SWEPCO Ex. 16 (Martin Reb.) at 9.

<sup>208</sup> CARD Ex. 1A (Norwood Dir.) at 15, Table 1 (HSPM).

<sup>209</sup> See CARD Ex. 1 (Norwood Dir.), Attachment SN-7 (SWEPCO Response to CARD RFI 4-18) ("Based on the low actual and forecasted peak and off-peak power prices at that time in comparison to Pirkey's total fuel costs and other non-fuel variable production cost, total fuel and other variable production costs were expected to be greater than energy revenues for the study period. As a result a 35% capacity factor was deemed to be a reasonable operating assumption.").

<sup>210</sup> Cooperatives Ex. 1 (Striedel Dir.) at 12.

<sup>211</sup> SWEPCO Ex. 16 (Martin Reb.) at 12-13.

be reasonable for SWEPCO to assume that the higher natural gas prices experienced in 2021 and 2022 will persist.

Regarding the capacity factor, SWEPCO witness Martin prepared an additional analysis using a 50% capacity factor and what he referred to as “unrealistically rosy assumptions,” and nevertheless, found that retiring the Pirkey plant continued to result in savings to customers, \$226 million in net present value savings and \$479 million in nominal savings based on the No Carbon scenario.<sup>212</sup> While the Pirkey plant had averaged an 80% capacity factor from 2010 to 2018,<sup>213</sup> the 50% capacity factor was close to what the plant had operated at in 2022 when power prices were high and, thus, was a reasonable input to consider.

As to the cost of coal, even if 2019 is excluded as an outlier, the evidence shows that the cost of coal delivered from the Sabine mine to the Pirkey plant doubled between 2005 and 2018.<sup>214</sup> NACC’s own witness previously testified that the fuel costs for the Pirkey plant were higher than all other SWEPCO solid-fueled plants except the now-retired Dolet Hills plant.<sup>215</sup> NACC also did not quantify the impact of using the 2019 cost of coal, so it is not clear whether it would have had a material impact on the analysis. Notably, Mr. Martin testified that only one-third of the total fuel cost is incremental and, therefore, included in dispatch costs.<sup>216</sup> The evidence

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<sup>212</sup> SWEPCO Ex. 16 (Martin Reb.) at 20-21.

<sup>213</sup> NACC Ex. 1 (Schwartz Dir.) at 16.

<sup>214</sup> SWEPCO Ex. 16 (Martin Reb.) at 7.

<sup>215</sup> SWEPCO Ex. 32 (Docket No. 50997, Schwartz Dir.) at 15, Table 9.

<sup>216</sup> SWEPCO Ex. 16 (Martin Reb.) at 32-33.

also shows that factors other than the cost of coal, such as SPP's merit order for dispatch, impacted the dispatch of the Pirkey plant.<sup>217</sup>

While retiring the Pirkey plant is also consistent with AEP's carbon emissions goals, the ALJs find intervenors' allegations that such goals were driving SWEPCO's retirement of the plant are speculative. As discussed above, SWEPCO showed that retiring the Pirkey plant in 2023 would result in significant cost savings to customers. Furthermore, the 2020 Analysis evaluated whether environmental retrofits should be made at six plants, and AEP ultimately chose to make the investments at four of the plants, which tends to show that AEP is not retiring fossil-fueled plants without regard to economics. As Ms. Ferry-Nelson testified, "advancing the carbon emissions goal and making decisions that economically benefit customers are not mutually exclusive."<sup>218</sup>

The intervenors' concerns about the potential impact on reliability of losing the Pirkey plant's capacity are not persuasive. The modeling for the 2020 Analysis chose the optimal resources to fill the capacity need created by retiring the plant.<sup>219</sup> The intervenors have not pointed to any statute or Commission rule that would require a utility to continue operating an uneconomic plant when other capacity options are available at a lower cost. Instead, intervenors appear to be seeking to treat the capacity value of existing or dispatchable generation differently than other

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<sup>217</sup> *Id.* at 32.

<sup>218</sup> SWEPCO Ex. 12 (Ferry-Nelson Reb.) at 20.

<sup>219</sup> SWEPCO Ex. 16 (Martin Reb.) at 4.

resources.<sup>220</sup> Yet, again, no party has cited any statute or Commission rule supporting preferential treatment. Moreover, the evidence did not show that SWEPCO's decision to retire the Pirkey plant would negatively impact reliability. Since making that decision, SWEPCO has made arrangements to replace the capacity that would be lost.<sup>221</sup> Thus, the ALJs do not find that SWEPCO has failed to plan for reliability.

As noted above, the prudence standard considers the range of options that a reasonable utility manager would exercise or choose. The ALJs conclude that SWEPCO's decision in November 2020 to retire the Pirkey plant was within the range of reasonable options and was prudent. Additionally, the evidence did not show that SWEPCO should have re-evaluated this decision during the Reconciliation Period.

#### IV. CONCLUSION

For the reasons discussed above, the ALJs conclude that SWEPCO's decision in November 2020 to retire the Pirkey plant in March 2023 was prudent, that the Company was not required to re-evaluate that decision during the Reconciliation Period, and that its decision not to seek aggregation of the Pirkey plant's two CCR ponds was also prudent. In support of these

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<sup>220</sup> See CARD Initial Brief at 7; Cooperatives Initial Brief at 5-6, 15; NACC Initial Brief at 7.

<sup>221</sup> SWEPCO Ex. 16 (Martin Reb.) at 24 ("Actions taken by the Company during 2022, such as proposing the acquisition of new generation facilities being reviewed in Docket No. 53625, extending the lives of existing gas units and entering into short-term [Capacity Purchase Agreements] with gas-fired capacity resources, will all be less expensive during the 2023-2026 period than either operating Pirkey as a lignite plant or converting it to burn natural gas. In addition, the Company has long term options that are less expensive than Pirkey.").

recommendations, the ALJs provide the following Findings of Fact, Conclusions of Law, and Proposed Ordering Paragraphs.<sup>222</sup>

## V. FINDINGS OF FACT

### Applicant

1. Southwestern Electric Power Company (SWEPCO) is a Delaware corporation registered with the Texas Secretary of State under filing number 1211806.
2. SWEPCO owns and operates for compensation equipment and facilities to produce, generate, transmit, distribute, sell, and furnish electricity in Texas.
3. SWEPCO is required under certificate of convenience and necessity number 30151 to provide service to the public and retail electric utility service within its certificated service area.

### Application

4. On August 31, 2022, SWEPCO filed an application with the Public Utility Commission of Texas (Commission) to reconcile its Texas-retail-jurisdictional fuel and fuel-related expenses and fuel revenues for the period of January 1, 2020, through December 31, 2021 (Reconciliation Period).
5. SWEPCO's fuel expenses and fuel revenues were last reconciled in Docket No. 50997.<sup>223</sup> The reconciliation for that proceeding was applied through December 31, 2019.

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<sup>222</sup> This Proposal for Decision only addresses the contested issues. As noted above, proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs on the uncontested issues are contained in the parties' Stipulation and SWEPCO's July 19, 2023 filing addressing rate-case expenses.

<sup>223</sup> *Application of Southwestern Electric Power Company for Authority to Reconcile Fuel Costs*, Docket No. 50997, Order (Nov. 19, 2021).

6. The reconciled fuel balance resulting from Docket No. 50997 for SWEPCO's Texas retail jurisdiction was an over-recovered balance, including interest, of \$19,912,155.
7. In its application, SWEPCO stated that during the Reconciliation Period, it incurred a total of \$673,456,496 in eligible fuel and fuel-related expenses and purchased-power costs to generate and purchase electric energy for its Texas retail customers.
8. In addition to the cost of fuel consumed by SWEPCO's generating plants, SWEPCO's eligible fuel expenses include costs allocated to its Texas retail customers for purchased power, environmental consumables, and emission allowances.
9. SWEPCO stated that it collected \$415,225,953 in revenues from its Texas retail customers through its fixed fuel factors during the Reconciliation Period.
10. SWEPCO stated that it returned \$1,281,134, excluding interest, during the Reconciliation Period through a refund approved by the Commission in Docket No. 49974.<sup>224</sup>
11. SWEPCO stated that, as of December 31, 2021, SWEPCO had a cumulative fuel under-recovery balance of \$226,582,663 (Texas retail), excluding interest.
12. As presented in its application, the calculation of SWEPCO's Texas retail fuel under-recovery balance, as of December 31, 2021, is summarized in the following table:

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<sup>224</sup> *Application of Southwestern Electric Power Company to Implement a Net Interim Fuel Refund*, Docket No. 49974, Order (Jan. 31, 2020).

**Summary Calculation of January 2020 – December 31, 2021 Texas Retail  
Reconciliation Principal Balance**

(1)	PUC Docket No. 50997 Ending Over-Recovery Balance \$	19,809,033
	(EXHIBIT JMY-1)	
(2)	Fuel and Fuel-Related Expenses	(673,456,496)
(3)	Fuel Factor Revenues	415,225,953
(4)	Interim Fuel Refund (Docket No. 49974)	(1,281,134)
(5)	Correction related to Tax Reconciliation Rider Surcharge in Docket No. 47929	202,801
(6)	Replacement Energy Adjustment for Turk plant merchant sales	12,917,180
(7)	End-of-Period Balance (under-recovery) \$	<u>(226,582,663)</u>

13. In its application, SWEPCO requested that the Commission establish customer-class reconciliation period-ending balances.
14. SWEPCO requested a prudence finding for the fuel-related contracts and arrangements entered into or modified during the Reconciliation Period. A list of those contracts was attached to SWEPCO's application as Appendix A. At the hearing on the merits, SWEPCO withdrew Natural Gas Transportation Contract No. 1011360 for Enable Gas Transmission from the list of contracts for which it was seeking a prudence finding because no costs were incurred under that contract during the Reconciliation Period.
15. SWEPCO requested recovery of the reasonable rate-case expenses, including expenses paid to reimburse intervening municipalities, that it (1) incurs in this proceeding through the final update prior to a cut-off date for evidence regarding rate-case expenses in this docket and (2) incurred in the following prior dockets: Docket No. 52397, SWEPCO's 2021 fuel surcharge filing; Docket No. 50997, SWEPCO's last fuel reconciliation proceeding (trailing expenses); and Docket No. 53093, SWEPCO's agreed fuel refund filing resulting from the settlement of Docket No. 50997.
16. With regard to the reasonableness and recovery of rate-case expenses associated with this proceeding that are incurred after the date covered by final update prior to the cut-off date, SWEPCO proposes that these trailing expenses be recorded as a regulatory asset and deferred for consideration in a future rate proceeding.

### **Notice**

17. SWEPCO provided notice of its application by bill insert to each retail customer in its Texas service territory. The bill inserts were included in bills running November 30, 2022, through December 30, 2022.
18. Notice of SWEPCO's application was published once each week for two consecutive weeks in newspapers having general circulation in each county of SWEPCO's service area: Bowie, Camp, Cass, Childress, Collingsworth, Donley, Franklin, Gregg, Hall, Harrison, Hopkins, Marion, Morris, Panola, Rains, Rusk, Shelby, Smith, Titus, Upshur, Van Zandt, Wheeler, and Wood counties. Notice by newspaper publication was completed on December 1, 2022.
19. Notice was given to all parties in Docket No. 50997, SWEPCO's most-recent fuel reconciliation proceeding, and the Commission staff (Staff) by electronic mail on August 31, 2022.
20. On January 18, 2023, SWEPCO filed the affidavit of Jennifer J. Frederick, the regulatory case manager for American Electric Power Service Corporation acting on behalf of SWEPCO, who attested and provided attachments showing that notice was provided in the manner described in Finding of Fact Nos. 17-19. Attachment A to the affidavit lists the newspapers that published notice of SWEPCO's application with the dates and counties of publication, attachment B includes the publishers' affidavits, and attachment C is a list of the recipients of SWEPCO's notice by electronic mail.
21. On November 7, 2022, Staff filed its recommendation on notice and recommended that SWEPCO's notice be deemed sufficient.
22. In State Office of Administrative Hearings (SOAH) Order No. 2, issued on November 10, 2022, the Administrative Law Judges (ALJs) deemed SWEPCO's notice to be sufficient.

### **Referral to SOAH**

23. On October 19, 2022, the Commission referred this case to SOAH.

24. On October 20, 2022, the Commission issued its Preliminary Order identifying the issues to be addressed in this proceeding.
25. The following parties intervened in this docket: East Texas Electric Cooperative, Inc. (ETEC) and Northeast Texas Electric Cooperative, Inc. (NTEC) (collectively, the Cooperatives); Office of Public Utility Counsel (OPUC); Cities Advocating Reasonable Deregulation (CARD); North American Coal Corporation (NACC); Texas Industrial Energy Consumers (TIEC); and Nucor Steel Longview LLC (Nucor). Staff also participated in this docket.
26. Prior to the hearing on the merits, the parties reached a partial settlement agreement resolving all issues in this proceeding except for the issue of whether SWEPCO's decision to retire the H. W. Pirkey Power Plant (Pirkey plant) was prudent.
27. The hearing on the merits was held on April 25-27, 2023, via videoconference, before ALJs Cassandra Quinn, Andrew Lutostanski, and Katerina DeAngelo. The hearing solely addressed the prudence of the Pirkey plant retirement decision.
28. On May 11, 2023, the parties filed initial post-hearing briefs.
29. On May 25, 2023, the parties filed post-hearing reply briefs and proposed findings of fact, conclusions of law, and ordering paragraphs on the contested issue, and the evidentiary record closed.
30. On June 22, 2023, SWEPCO filed the unopposed agreement of the parties, which included proposed findings of fact, conclusions of law, and ordering paragraphs regarding the uncontested issues. SWEPCO, Staff, OPUC, TIEC, and CARD agree to the Commission's implementation of the agreement; and Nucor and the Cooperatives do not oppose it.
31. The evidentiary record was reopened for the limited purpose of admitting additional exhibits filed after the hearing on the merits, including the parties' agreement and updates to SWEPCO's and CARD's rate-case expenses incurred in this proceeding.

### **Testimony and Statements of Position**

32. On August 31, 2022, SWEPCO filed direct testimony with its application. The direct testimony was admitted into evidence at the hearing on the merits.
33. On March 3, 2023, intervenors filed direct testimony. The direct testimony was admitted into evidence at the hearing on the merits.
34. On March 10, 2023, Staff filed direct testimony. The direct testimony was admitted into evidence at the hearing on the merits.
35. On March 31, 2023, SWEPCO filed rebuttal testimony. The rebuttal testimony was admitted into evidence at the hearing on the merits.
36. On April 20, 2023, Nucor and TIEC filed statements of position.

### **Prudence of SWEPCO's Decision to Retire the Pirkey Plant**

37. The Pirkey plant is a 675-megawatt (MW) single-unit lignite-fired generation facility located in Harrison County, Texas.
38. The Pirkey plant began providing service to customers in 1985 and had an original retirement date of 2045.
39. Lignite for the Pirkey plant was sourced from the adjacent Sabine mine by a contract miner, the Sabine Mining Company, on reserves controlled by SWEPCO.
40. The Pirkey plant is owned by SWEPCO (86% or 580 MW), NTEC (11.7%), and Oklahoma Municipal Power Authority (2.3%).
41. On November 5, 2020, SWEPCO announced that it would retire the Pirkey plant in March 2023 rather than retrofit it to continue operations in compliance with the U.S. Environmental Protection Agency (EPA) Coal Combustion Residual (CCR) Rule and Effluent Limitation Guidelines (ELG).
42. The CCR Rule, finalized in 2015, regulates the disposal and beneficial use of CCR.

43. The CCR Rule applies to new and existing CCR storage facilities and surface impoundments (ponds) at operating coal-fired electric generating units, which includes the Pirkey plant.
44. The Pirkey plant had two unlined bottom ash surface impoundment ponds subject to the CCR Rule—the east bottom ash pond (EBAP) and the west bottom ash pond (WBAP)—for the management of bottom ash and non-CCR wastewaters.
45. The EBAP and WBAP are 31.5 and 30.9 acres, respectively.
46. The CCR Rule required that the two unlined CCR impoundment ponds at the Pirkey plant cease operation and initiate closure by April 11, 2021, unless they qualified for an extension.
47. The CCR Rule provided SWEPCO with two options for an extension. SWEPCO could extend the deadline by asking the EPA for additional time to either retrofit the existing ponds or install an alternative ash disposal system. Alternatively, SWEPCO could extend operations by committing to permanently cease coal combustion at the Pirkey plant. The length of extension under the retirement alternative depended on the size of the ash pond and the time required to complete closure. Plants with CCR surface impoundments of 40 acres or less could operate until October 17, 2023, and plants with surface impoundments larger than 40 acres could operate until October 17, 2028.
48. To proceed under either extension option, SWEPCO was required to submit to the EPA a demonstration of qualification by November 30, 2020.
49. SWEPCO timely notified the EPA of its commitment to retire the Pirkey plant and submitted its demonstration of qualification under the CCR Rule's retirement provision for an extension of the closure deadline to October 17, 2023.
50. The Pirkey plant's two CCR impoundments are independent and distinct ash disposal units regulated separately by the CCR Rule.

51. SWEPCO has twice spoken with EPA staff about combining independent CCR impoundments to extend the CCR Rule's retirement deadline, and they indicated that the EPA would not approve such a request.
52. The decision to retire the Pirkey plant is supported by an economic analysis prepared in Fall of 2020 (the 2020 Analysis) based on the information available to SWEPCO at the time that the decision had to be communicated to the EPA.
53. SWEPCO's parent company, American Electric Power (AEP), prepared the 2020 Analysis internally to review six coal and lignite plants owned by four operating companies in the AEP system to determine whether the investments needed for compliance with the CCR and ELG rules should be made or not. AEP elected to make the compliance investments at four of the six plants, including SWEPCO's Flint Creek plant and three owned by other AEP-operating utility companies.
54. The 2020 Analysis projected that retirement of the Pirkey plant would save customers between \$326.9 million and \$462.4 million in net present value savings and between \$739 million and \$1.168 billion in nominal savings.
55. The 2020 Analysis informed SWEPCO's decision to retire the Pirkey plant.
56. The 2020 Analysis had limitations because it included only one sensitivity analysis and did not model more than one natural gas price scenario. In addition, the capacity factor for the Pirkey plant used in the analysis (approximately 35%) was significantly below the capacity factor assumed in SWEPCO's 2018 and 2019 Integrated Resource Plans. The cost of coal was inflated by the use of 2019 costs, which were impacted by a plant outage.
57. At the time of the analysis, SWEPCO prepared low and high natural gas fundamentals forecasts, but they were not formally included in the analysis.
58. After SWEPCO announced its retirement decision, natural gas prices spiked in early 2021 and experienced volatility, but have declined from the highs experienced in 2021 and 2022. The Energy Information Administration's 2022 and 2023 Annual Energy Outlook forecasts show that, around 2025 to 2026, gas prices will return to the levels it forecasted in 2020.

59. Using a 50% capacity factor in the analysis, the retirement of the Pirkey plant continued to result in savings to customers, at least \$226 million (net present value) and \$479 million (nominal).
60. Even if the 2019 cost of coal is excluded, the cost of coal delivered from the Sabine mine to the Pirkey plant doubled between 2005 and 2018.
61. Factors other than the cost of coal, such as the Southwest Power Pool's merit order for dispatch, impacted the dispatch of the Pirkey plant.
62. Continuing to operate the Pirkey plant would be more expensive for customers even if there were zero costs for CCR and ELG compliance.
63. SWEPCO's decision to retire the Pirkey plant was not shown to negatively impact reliability.
64. SWEPCO's decision in November 2020 to retire the Pirkey plant in 2023 was within the range of options a reasonable utility manager would have exercised or chosen in the same or similar circumstances given the information or alternatives available at that time and, therefore, was prudent. SWEPCO was not required to re-evaluate that decision during the Reconciliation Period.
65. SWEPCO's decision not to seek aggregation of the Pirkey plant's two CCR ponds was within the range of options a reasonable utility manager would have exercised or chosen in the same or similar circumstances given the information or alternatives available at that time and, therefore, was prudent.

## **VI. CONCLUSIONS OF LAW**

1. SWEPCO is a public utility as that term is defined in Public Utility Regulatory Act (PURA)<sup>225</sup> § 11.004(1) and an electric utility as that term is defined in PURA § 31.002(6).
2. The Commission has jurisdiction over this matter under PURA §§ 14.001 and 36.203(e), and 16 Texas Administrative Code (TAC) §§ 25.235-.237.

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<sup>225</sup> Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016.

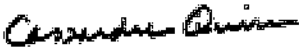
3. SOAH has jurisdiction over all matters relating to the conduct of the hearing in this proceeding under PURA § 14.053 and Texas Government Code § 2003.049.
4. The Commission processed this docket in accordance with the requirements of PURA, the Administrative Procedure Act, and Commission rules.
5. SWEPCO provided notice of its application in compliance with 16 TAC § 25.235(b).
6. The hearing on the merits was set and notice of the hearing was given in compliance with Texas Government Code §§ 2001.051 and 2001.052.
7. Prudence is the exercise of that judgment and the choosing of one of that select range of options which a reasonable utility manager would exercise or choose in the same or similar circumstances given the information or alternatives available at the point in time such judgment is exercised or option is chosen. *Gulf States Utils. Co. v. Pub. Util. Comm'n*, 841 S.W.2d 459, 475 (Tex. App.—Austin 1992, writ denied).
8. There may be more than one prudent option within the range available to a utility in a given context. Any choice within the select range of reasonable options is prudent, and the Commission should not substitute its judgment for that of the utility. The reasonableness of an action or decision must be judged in light of the circumstances, information, and available options existing at the time, without benefit of hindsight. *Nucor Steel v. Pub. Util. Comm'n*, 26 S.W.3d 742, 752 (Tex. App.—Austin 2000, pet. denied); *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 46449, Order on Rehearing at Conclusion of Law No. 16 (Mar. 19, 2018).
9. A utility bears the burden of proving that its decision making was prudent. *Entergy Gulf States, Inc. v. Pub. Util. Comm'n of Tex.*, 112 S.W.3d 208, 215 (Tex. App.—Austin 2003, pet. denied).
10. SWEPCO met its burden of proof to demonstrate that its decision in November 2020 to retire the Pirkey plant in 2023 was prudent.
11. SWEPCO met its burden of proof to demonstrate that its decision not to seek aggregation of the Pirkey plant's two CCR ponds was prudent.

## VII. PROPOSED ORDERING PARAGRAPHS

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders:

1. The Commission denies all other motions and any other requests for general or specific relief, if not expressly granted.

**SIGNED July 24, 2023.**



Cassandra Quinn

Administrative Law Judge



Katerina DeAngelo

Administrative Law Judge